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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein & Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner.

JANUARY 15, 1986

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QUESTIONS PRESENTED

1. Does not the constitutional allocation of powers and the purposes for which that allocation was adopted require that impeachment and removal by Congress precede the exercise of discretionary power by the Executive to prosecute and thereby compel the federal courts to try a United States judge on charges that he committed high crimes in office with the attendant risk that he may be convicted and imprisoned while still in office?

2. Does not the fact that the Executive clearly could exercise its prosecutorial powers to chill and undermine the independence of federal judges impose upon a federal court a duty to afford an accused federal judge an opportunity to prove substantial and specific allegations that officers of the Execu-

tive misused their powers and those of the grand jury to obtain the indictment and were motivated in fact by an intent to drive the accused judge from office and punish him for the manner in which he had exercised the judicial power?

3. May a trial court withhold and deny a defendant any opportunity to use summaries prepared by FBI and IRS agents of pretrial statements made by prosecution witnesses, including summaries showing that a key witness for the prosecution had made pretrial statements that directly contradicted crucial testimony he gave at trial?*

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* The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States District Judge Harry Eugene Claiborne petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment that court entered against him.

OPINIONS BELOW

In January 1984, the district court entered an order denying petitioner's motion to quash the indictment and

dismiss the proceedings (A. 176). That decision was not reported. A special panel sitting as the court of appeals affirmed the district court's decision and remanded the case for trial (A. 86-124). That decision was reported. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984) ("Claiborne I").

After the second trial, the district court entered a judgment of conviction upon a jury verdict, denied petitioner's motion for a judgment of acquittal or a new trial, and sentenced petitioner to a term of imprisonment. A different special panel, again sitting by designation, affirmed the conviction (A. 1-85). That decision has been reported. United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985) ("Claiborne II"). One of the judges in active service on the court of appeals who had not disqualified themselves dissented

from that court's denial of petitioner's suggestion that the appeal be reheard en banc (A. 127-35). That opinion has not yet been reported.

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on July 8, 1985. The petition for rehearing and suggestion for rehearing en banc were denied on December 10, 1985 (A. 125-26). The present petition was filed on January 15, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first two questions presented concern the proper construction of the provisions of the United States Constitution governing the tenure and removal of federal judges. U.S. Const., art.

III, § 1; art. I, § 2, cl. 5, and § 3, cl. 6 and cl. 7; and art. II, § 4. In order to resolve those questions, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government (U.S. Const., art. I, § 1; art. II, § 1, cl. 1, § 2, cl. 1 and cl. 2, and § 3; and art. III, § 1 and § 2, cl. 1 and cl. 3) and the statute codifying the requirements for impartiality [28 U.S.C. § 455 (1982)]. The third question presented raises issues concerning the proper application of the Due Process and Confrontation Clauses of the Constitution (U.S. Const. Amends. V and VI) and the provisions of the Jencks Act [18 U.S.C. § 3500 (1982)], as incorporated as Rule 26.2 of the Federal Rules of Criminal Procedure (collectively, the "Jencks Act").

These provisions have been included in the appendix to this petition (A. 177-92).

STATEMENT OF THE CASE

Petitioner is the third United States district judge in active service that the Executive has prosecuted for his conduct in office during the past three years. He is the first of these that has been convicted. He is also the first to be sentenced to a term of imprisonment that will effectively remove him from his office for the period of his incarceration. He has not resigned and does not intend to resign from office until he has obtained vindication in the courts or in the House and Senate.

The present petition presents this Court an opportunity to review and resolve fundamental constitutional issues raised by the prosecution and trial of sitting federal judges on a completed record. In

petitioner's view that record demonstrates the need for such review to assure not only that these fundamental questions are finally resolved, but also that this Court has an opportunity to examine the procedures by which one judge was indicted, tried, and convicted so that it can exercise its supervisory powers to provide authoritative guidance on how future proceedings are to be conducted, if it finds such proceedings are constitutionally permissible. In order to frame those issues adequately and to demonstrate the need for this Court to exercise its supervisory powers, petitioner's counsel found it necessary to present a more extensive statement of the case than might otherwise have been appropriate.

Statement of Material Facts

1. The facts necessary to an understanding of the first question presented

may be simply stated. Harry Eugene Claiborne was duly appointed to serve and took office as a district judge of the United States District Court for the District of Nevada in 1978. On December 8, 1983, attorneys for the United States filed an indictment that alleged that Judge Claiborne has committed seven felony crimes (A. 137-48). The indictment alleged that each of those crimes was committed while Judge Claiborne was in active service as a United States district judge. Judge Claiborne was ultimately convicted on two counts of willfully and intentionally filing false income tax returns after his appointment to the bench. The trial judge sentenced Judge Claiborne to two concurrent two-year terms of imprisonment and recommended that he be incarcerated in Bureau Prison's facility at Maxwell Air Force Base in Alabama.

Judge Claiborne has not resigned from office.

2. The material facts necessary to a proper understanding of the second question presented are more complex. Because the trial court denied the motion by which Judge Claiborne presented this question to it without hearing evidence, the facts alleged and proffered (see A. 149-76) must be accepted as true. Thus only the central allegations and proffers need be described here.[1]

The FBI opposed the nomination and appointment of Judge Claiborne because of his extensive activity, success, and prominence as a criminal defense lawyer.

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1. Petitioner filed with this Court a substantial appendix in support of his Emergency Application for Stay or Writ of Injunction to Protect this Court's Jurisdiction, Claiborne v. United States, No. A-725 (1984). The material facts are reported in some detail with specific references to materials then in the record below in that appendix at pages 83-97.

The President and the Senate rejected the FBI's recommendation, and Judge Claiborne was duly appointed and took office. Thereafter, agents working with the Justice Department's Organized Crime Strike Force in Nevada made no attempt to conceal the disdain with which they viewed Judge Claiborne, his colleague on the district bench, and leading members of the Nevada defense bar. What was initially concealed was the fact that subordinate officials of the Strike Force and the FBI had continued to investigate Judge Claiborne after he assumed office. Published reports and the evidence proffered by Judge Claiborne showed that even prior to the investigations leading to the indictment below, federal officials had misused their powers and those of at least one grand jury to induce witnesses to provide information against Judge Claiborne, to intimidate those who declined

to cooperate or who had supported his nomination, and to intercept mail and telephone communications between Judge Claiborne and others.

Far more significant abuses occurred in the investigation that ultimately produced the indictment below. Strike Force and FBI officials learned that a fugitive brothel owner, Joseph Conforte, had offered to provide information against Judge Claiborne in exchange for a reduction in sentence and assistance in reducing the liability that resulted from his conviction on four counts of tax evasion and his exposure on other charges then being investigated by the State of Nevada. In order to make a deal with Conforte, however, these officials had to overcome two major obstacles. First, the Nevada district director of the Internal Review Service, Gerald Swanson, was opposed to

any settlement that rewarded a convicted felon who had fled to Brazil to avoid criminal and civil liability for his failure to pay taxes, a liability amounting to some twenty million dollars. Second, Conforte had fled in 1980, immediately after this Court had declined to review the court of appeals's judgment affirming his conviction on four counts of tax evasion and a five-year sentence of imprisonment on one of those counts.[2] More than 120 days had elapsed since the judgment has become final. Thus, Rules 35(b) and 40 of the Federal Rules of Criminal Procedure; decisions such as United States v. Robinson, 361 U.S. 220 (1960), and its progeny; and established Justice Department policy seemingly precluded any reduction in the five-year

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2. United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied 449 U.S. 1012 (Dec. 1, 1980).

sentence. The manner in which these obstacles were overcome illustrates the magnitude of the abuses these subordinate federal officials employed and evidences the intent they harbored against Judge Claiborne.

To remove director Swanson, the officials set up a sting operation against him. Although the sting resulted in Swanson's transfer from the district of Nevada, the tactics employed were so outrageous that internal investigations by both the Justice Department and the Treasury resulted in reports condemning the tactics used and the results achieved. Indeed, the Treasury report concluded not only that Swanson had done nothing improper, but also that the investigating and prosecuting officials had improperly induced a grand jury to indict an innocent man and had exercised their powers to

force him to plead guilty to a crime he had not committed.

The second obstacle ultimately proved less substantial. A week after Conforte returned and testified before a Nevada grand jury, the prosecutor in this case presented a motion for a reduction of Conforte's sentence to a United States district judge in Washington, D.C., sitting by designation as a judge of the district of Nevada. Three years after this Court had declined to review the sentence, and more than two-and-a-half years after Conforte's original motion for reduction in sentence had been denied,[3] the designated judge granted the prosecutor's motion and reduced the five-year sentence to fifteen months.

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3. United States v. Conforte, Civ-R-77-24-ECR (D. Nev. Apr. 1, 1981) (five-page order and opinion denying Conforte's Rule 35 Motion for reduction in sentence by Reed, D.J.).

Between the start of the Conforte-based investigation and the return of the indictment, the officials conducting the investigation employed three grand juries. They had FBI agents improperly sworn as agents of the grand jury, and these agents admittedly misused their powers as grand jury agents. They had Conforte testify that he had given Judge Claiborne a bribe in the face of statements by the two former assistant United States attorneys that they had won the case in which the bribe was allegedly paid and that there had been no attempt by Judge Claiborne to improperly influence them. They did not call either of these attorneys to testify before the grand jury. Moreover, when one of Judge Claiborne's accountants advised the prosecutors that he wished to return to the grand jury to clarify his testimony, they withdrew his subpoena and

advised him that he was a target in order to prevent further testimony. The testimony Conforte gave at the first trial was so inherently incredible and fraught with inconsistencies that the prosecutors abandoned the Conforte counts. Nonetheless, it was the third grand jury, the one that heard the unchallenged version of Conforte's testimony, that was finally persuaded to indict Judge Claiborne for criminal tax evasion as well as for the Conforte-alleged corruption.

The motion Judge Claiborne filed and the affidavits, exhibits, and proffers he tendered to support it alleged that the indictment had been the product of a three-year war by Nevada Strike Force and FBI officials to drive him from the bench. That motion identified specific witnesses and documents he would subpoena and present to provide competent evidence

to prove his allegations. The foregoing summary describes only the major allegations that he made in support of his claim in order to make clear their nature and substantiality.

3. The facts necessary to understand the third question presented are not subject to dispute. Judge Claiborne was prosecuted and convicted on charges that he had signed and filed income tax returns in 1980 and in 1981 which he knew did not report amounts that he had received as professional income in the preceding years. There was no dispute over the fact that each return failed to accurately report or include money that Judge Claiborne had in fact received and that was properly taxable to him as income. Judge Claiborne denied, however, that he had had any intent to file a fraudulent report and claimed that he had relied upon his

accountants, Joseph Wright and his wife Connie, who had kept his books and who had prepared his income tax returns until 1980, and Jerry Watson, d/b/a Creative Tax Planning, who had advised him and prepared the 1980 return that was filed in 1981.

Both Judge Claiborne's credibility and his defense rested in large measure on his testimony that he had disclosed to his accountants income that was not reported on his returns. Judge Claiborne testified that on April 11, 1980, he had written to Wright informing him that he had received $41,000 during 1979 from fees earned before he became a judge. Judge Claiborne's secretary testified that she had personally delivered this letter to Wright's office. Wright, however, was called by the prosecution and testified unequivocally that he had no recollection of ever having seen the letter. Given the

lapse in time, Wright's more damaging assertion was that he had never misplaced or lost any of Judge Claiborne's records or files and that he did not have the letter.[4] Thus the weight the jury attached to Wright's assertions was central to its determination of Judge Claiborne's credibility and thus to his defense. The jury found Judge Claiborne guilty.

More than a month after the trial, the presiding judge made an extraordinary disclosure. Six months earlier, during this first trial, defense counsel noted

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4. Judge Claiborne testified that he had also disclosed the income he had received from his former practice in 1980 to Watson. Watson testified at trial, and confirmed that the judge had made full disclosure. Watson's testimony was confirmed by his own notes as well as by Judge Claiborne's. Thus, the government's case was dependent upon persuading the jury that Judge Claiborne's testimony was entitled to neither weight nor belief. The primary basis for that claim was Wright's testimony that the 1980 letter was not in his perfectly maintained client files.

that the prosecution had not supplied any FBI reports of interviews with any of the witnesses it had called. The presiding judge recognized that such materials might contain discoverable material and directed the prosecution to submit all such summaries. The prosecuting attorneys then submitted hundreds of documents under seal requesting in camera inspection in response to Judge Claiborne's Jencks Act and Brady discovery requests. At that time the presiding judge expressly represented that he would review all the documents and evaluate all summaries of pretrial witness statements prepared by FBI and IRS agents "as to all witnesses." The only materials he ever released from any of these documents were occasional fragments that an agent had placed in quotation marks.

At the post-trial hearing, however, the presiding judge disclosed that he

had never completed the promised review. It was at this hearing that Defendant first learned that "hundreds" of interview reports existed that had been submitted by the prosecution, but never reviewed by the court. These materials included five pages of summaries prepared from three interviews with Wright.

> COURT: I think I was asked to review 302 forms [FBI interview summaries]. I have no specific recollection of seeing this. I follow the practice, gentlemen, on the upper portion on each of the 302 forms, in the upper left-hand portion you will find WEH, USDJ. That is not appearing here. That's all I can say. I am turning these over to defense counsel and he can examine them and proceed from there. I will take a recess. You may examine those documents. Maybe in the record somewhere, in the pretrial hearings you will find that I did examine it. If so, I tried to summarize it each time. I don't know, there's so many hundreds of them, I can't recall specifically. It may have been done at the hearing that has never been typed up, namely February 21,

> 1984. I don't know. That hearing has never been typed up at the request of anybody. All right. We will take a ten minute break while we examine those documents. (A recess was taken.)

Transcript of Proceedings, October 2, 1984, pp. 60-61 (emphasis added).[5]

The trial judge then presented counsel for Judge Claiborne with sealed envelopes containing numerous unreviewed documents and ordered a ten-minute recess so they could be examined.

It was during that recess that Judge Claiborne learned that FBI and IRS agents had prepared extensive summaries of statements the Wrights had made during three investigative interviews. Those statements disclosed, among other information, that during the investigation Wright had stated that a substantial portion of

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5. The transcript has been examined. There is no reference to the interview reports.

Judge Claiborne's records had been thrown away when he had moved his office in 1981. That move took place after the 1979 return had been filed and after the Wrights had determined that Judge Claiborne was no longer using either their bookkeeping or tax-preparation services. The ten-minute recess was, however, the only opportunity counsel for Judge Claiborne had to examine these documents before the trial judge ruled that summaries of witness interviews prepared by government investigators did not constitute Jencks Act or Brady material, denied the pending motion, and re-sealed the remaining materials.

The Prior Proceedings

1. The indictment was filed in December 1983. Judge Claiborne promptly filed a motion, supplemented by an extensive proffer, asking the court to quash the indictment and dismiss the proceedings

(A. 149-58). In that motion he asserted two separate constitutional claims. First, he claimed that the constitutional provisions designed to keep separate the powers of government and to protect the independence of the courts required that the impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive to compel a federal court to exercise criminal jurisdiction over one of its judges. Second, and alternatively, he claimed that, at a minimum, the Constitution prohibited an Executive prosecution initiated specifically for the purpose of punishing a judge for his judicial acts and in retaliation for the manner in which he had exercised the judicial power. He claimed that the rights a judge derived from Article III of the Constitution and the need to prevent the Executive from

impermissibly intervening in the judicial function made it necessary that the court hear evidence in support of the second claim and, if it was proven, prohibit the Executive from proceeding further. The district court considered the motion and the supplemental proffer (A. 159-75) and rejected both claims without receiving evidence (A. 176). Judge Claiborne promptly appealed.

The special panel designated to hear that appeal agreed that Judge Claiborne's first claim presented substantial and unresolved constitutional issues and that the order denying that claim had been a final and appealable order under 28 U.S.C. § 1291 (A. 90-94). The court affirmed the district court on the merits (A. 94-114). The court went on to hold that the district court's denial of Judge Claiborne's

second claim was not appealable (A. 115-16).

Judge Claiborne applied to this Court for a stay of trial proceedings pending the filing and disposition of a petition for writ of certiorari. In denying that application, the Circuit Justice indicated that he "did not believe that four Justices of this Court would vote to grant certiorari to review any one of the claims [asserted in the application] at the present stage of this litigation. Claiborne v. United States, 104 S.Ct. 1401 (1984) (Rehnquist, Circuit Justice, in chambers)(emphasis supplied). Thereafter, the Court denied a renewed application for stay (id. at 1463) and denied the subsequent petition. 105 S. Ct. 113 (1984).

2. The first trial was declared a mistrial because the jury was unable to reach a verdict on any of the counts. On

the prosecution's motion, the district court dismissed the four Conforte-based counts alleged in the indictment with prejudice, and Judge Claiborne was tried a second time on the three remaining counts. The jury found him not guilty on the count alleging that he had filed a false report with the Judicial Ethics Committee, but found him guilty on the two counts alleging he had intentionally filed false income tax returns.

Judge Claiborne moved for a judgment of acquittal or for a new trial. It was at the hearing on that motion that the trial judge disclosed that he had not examined all the material that the prosecutors had submitted for in camera inspection. The cursory post-trial examination permitted by the trial judge revealed that the materials submitted included the summaries of pretrial statements that

defendant's accountant and his wife had made to agents of the Federal Bureau of Investigation and the Internal Revenue Service. Without hearing evidence, the judge ruled, however, that summaries made by government agents did not constitute "statements" within the meaning of the Jencks Act, 18 U.S.C. § 3500, or "exculpatory materials" within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), and thus that his failure to examine or disclose them had not constituted error. He denied Judge Claiborne's motion for a judgment of acquittal or in the alternative a new trial.

3. Three different judges from outside the Ninth Circuit were designated to hear Judge Claiborne's second appeal. This special panel again decided that the Constitution did not require that impeachment and removal precede the prosecution

and trial of a federal judge in his own court (A. 6-8). This special panel summarily rejected as "disingenuous" the claim that the protections mandated by Article III of the Constitution and the separation of powers doctrine provided a separate and enhanced basis that required the district court to hold an evidentiary hearing on Judge Claiborne's allegations that prosecutorial agents had abused their powers and those of the grand jury to drive him from the judicial office and punish him for the manner in which he had exercised the judicial power (A. 8-9). Although it noted that numerous actual and possible abuses and errors in the prosecution and trial had occurred, the special panel rejected that remainder of Judge Claiborne's claims on the ground that the record did not show that the trial judge had abused his broad discretion or that any one of

the claimed errors had had the requisite prejudicial effect (A. 9-85).

As Circuit Judge Ferguson made clear in dissenting from the denial of rehearing en banc (A. 127-35), the special panel misperceived the Jencks Act and Brady issues and the record before it. The panel did not independently review the materials that the trial judge had withheld from the defendant (A. 135). It ruled as a matter of law that the summaries that were before it were not "statements" within the meaning of the Jencks Act (A. 66-68). It acknowledged that the summaries of the accountant's statements were Brady material, but ruled that the trial court's failure to disclose them had not prejudiced defendant's rights sufficiently to require a new trial (A. 70-77).

Judge Claiborne filed a petition asking the special panel to rehear the

case and suggesting that the court of appeals grant rehearing en banc. Although a majority of the judges who had not disqualified themselves did not vote for rehearing en banc (A. 125), Judge Ferguson's dissenting opinion frames the third question presented and sets out important reasons why review should be granted by this Court (A. 127-35).[6]

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6. The court's decision denying rehearing en banc indicates that there were enough circuit judges in active service in the Ninth Circuit who had not recused themselves to constitute a panel or a quorum for rehearing. That disclosure raises troubling questions concerning the issuance of the certificate of necessity that led to the designation of the two special panels that heard Judge Claiborne's appeals. A sister court had decided that disqualification of all circuit judges was not required as a matter of law when a district judge within the circuit was indicted and appealed in United States v. Hastings, 681 F.2d 706, (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). It is now unclear why Judge Claiborne was denied the normal random assignment of judges on appeal and was forced to present his case before judges specially selected to hear his appeals.

REASON WHY REVIEW SHOULD BE GRANTED

One reason alone ought suffice to command review in this Court. Judge Claiborne is the fourth United States district judge against whom the Executive has exercised its investigative powers and those of the grand jury since 1981. He is the third of these to be indicted; the second to be tried; and the first to be convicted. He has claimed that the Constitution defines a mandatory sequence of remedies when the Executive alleges that a United States judge has committed high crimes in office, a claim that three circuits have acknowledged to be substantial and unresolved. He has claimed that the Executive misused its powers and those of the grand jury to drive him from judicial office in a manner that is inconsistent with the minimum conditions necessary to preserve judicial indepen-

dence in the federal district courts. He has claimed that the special procedures necessary to try this judge resulted in a trial that was fundamentally unfair and that denied him rights that other individuals accused of crimes must be accorded.

Whatever the proper disposition of these claims on the merits, petitioner submits that this Court should not let this district judge go to jail until it has thoroughly reviewed the claims and satisfied itself that the exercises of executive and judicial powers that produced the conviction below can and did comport with the essential requirements of the Constitution. Whatever the disposition on the merits, petitioner submits that those who serve on the federal trial bench and are most vulnerable to attack are entitled to a definitive resolution that explains those essential requirements

and lays down guidelines for their application in the future. That resolution can only come from this Court. Petitioner submits that that resolution should come before he is forced to enter a federal prison as a United States district judge in active service.

I. The First Question Presented

1. The Court should grant the writ so that it may finally resolve the first question presented. Judge Claiborne is the third United States district judge to be indicted in the past four years for conduct that occurred while he was in office. He is the first to come before this Court who has been convicted for conduct that occurred while he was in office and who has elected to remain in office while he seeks a hearing and vindication -- in the court or before

Congress.[8] Recent investigations and prosecutions by the Justice Department make it clear that the prosecution of federal judges has now become established and institutionalized within the Executive Branch. It is no longer an isolated phenomenon.

This Court has traditionally recognized that judicial independence is sufficiently central to our constitutional

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8. Marvin Manton had resigned from office before trial and, after his conviction, he sought absolute immunity rather than the sequential application of remedies for malconduct in office. United States v. Manton, 107 F.2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940). Otto Kerner was tried and convicted for conduct that occurred while he was Governor of Illinois, before he was appointed judge. Moreover, he did not raise the question presented here until after his conviction. United States v. Isaacs, 493 F.2d 1124 (7th Cir.)(special panel), cert. denied, 417 U.S. 976 (1974). He resigned from office before going to prison. Both prosecutions were isolated instances of a kind that had rarely occurred before the 1980's. See, e.g., J. Borkin, The Corrupt Judge (1962).

scheme of government to command this Court's attention. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (lack of Article III protections precludes assignment of compulsory jurisdiction over contract claims to Article I bankruptcy judges), and Pulliam v. Allen, 104 S.Ct. 1970 (1984) (common law immunity does not bar award of declaratory and injunctive relief and attorneys fees under federal civil rights statutes against state court magistrates). The Justices of this Court should be fully aware of the underlying constitutional issues raised by this petition and the practical consequences to the Judiciary. See, e.g., Petition for Writ of Certiorari, Hastings v. United States, 459 U.S. 1203, (1983) ("Hastings Petition") (cert. denied) (similar claim presented). The Executive's exercise of

its claimed powers here has again made the federal judiciary notorious and newsworthy. See, e.g., J. Riley, Stacked Deck for a Judge? Focus Shifts to Probe Tactics, Nat'l L. J., Jan. 23, 1984, at 1, and The Deal Conforte Cut: Is It Legal?, id. at 30 (reporting on alleged abuses leading to the prosecution of Judge Claiborne). In essence, this petition simply asks this Court to act upon that awareness and acknowledge that the fundamental constitutional questions concerning the protections necessary to maintain the constitutionally mandated independence of federal judges are as deserving of this Court's attention as are questions concerning the protections necessary to exercise the federal judicial power to resolve common-law contract disputes or the scope of common-law immunities that must be afforded state court judicial officers.

2. The constitutional questions are fundamental. Pursuant to Articles I, II, and III of the Constitution, Judge Claiborne is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. I, § 2, cl. 5, and § 3, cl. 6; art. II, § 4; and art. III, §§ 1 and 2. The framers designed these provisions to protect judges serving on federal courts from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only remedy for judicial misconduct "consistent with the necessary independence of a judicial character." The Federalist, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

Until recent times the framers' understanding was shared by all three branches of government, here and in England. The Crown has never prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 285 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive never attempted to prosecute an Article III judge; charges of serious judicial misconduct were invariably referred to the House of Representatives. See J. Borkin, The Corrupt Judge (1962) (for a summary).

Three circuits have now considered a federal judge's claim that the Constitution defines a mandatory sequence of remedies for alleged criminal misconduct in office. Claiborne I, A. 90-114, and

Claiborne II, A. 6-8; Hastings, 681 F.2d 706, 709-12; and United States v. Isaacs, 493 F.2d 1124,1140-44 (7th Cir.) (special panel), cert. denied, 417 U.S. 976 (1974). All have recognized that the claim presents substantial issues of inter-branch comity that directly effect the independence of Article III judges and that have not been resolved by this Court. Claiborne I, A. 90-114; Claiborne II, 6-8; Hastings, 681 F.2d at 708-09; Isaacs, 493 F.2d at 11, 40-41.

The abortive investigations into Chief Judge Battisti's (N.D. Ohio) conduct of his office and the recently initiated prosecution of Judge Nixon (D. Miss) make it clear that the issue will recur. Whatever the proper resolution, there in nothing to be gained and much to be lost by leaving the issue for circuit-by-circuit resolution. Considerations of

judicial economy as well as a decent respect for the judicial office point toward prompt and final resolution by this Court.

3. The Executive has asserted that the Attorney General, the United States attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[9] The

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9. Brief for Appellee United States of America at 42-43, United States v. Hastings; quoted in Hastings Petition at 10.

use of mail intercepts and purchased testimony have been added to the list of claimed powers by this case. As early as 1980, the Justice Department acknowledged that, in the first five years of its existence (1976-1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[10]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many

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10. Judicial Tenure and Discipline - 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. (Comm. Print. 1980), 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States attorneys or other federal agencies. The Executive has not reported whether any of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'. We do know, however, that at least four investigations and three prosecutions have been initiated since 1980.

There are five hundred United States district judges in active service. Almost

fifty percent of the cases coming before them involve disputes to which the Executive is a party.[11] Daily, these judges must deal with Justice Department attorneys employed to assert the Executive's interests and, on the criminal side, to exercise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people -- the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

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11. See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts (any year).

II. The Second Question Presented

1. It is precisely that context that makes the second question specially important. Judge Claiborne alleged and offered to prove in the district court that the Executive's decisions to investigate and prosecute him were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he had exercised the judicial power in cases to which the Executive had been a party. He claimed that, at a minimum, the Constitution must be construed to afford a federal judge protections comparable to the protections afforded a member of Congress under the speech and debate clause. See, e.g., United States v. Brewster, 408 U.S. 501 (1972) (Speech and debate immunity limited to protect legislative acts from attack). Judge Claiborne asserted that

judges must be protected from exercises of Executive discretion intended directly to undermine the judicial function.

That claim is a separation-of-powers claim. The claim is based upon rights Judge Claiborne holds as a judge, not upon due process rights he holds as an individual. The particular claim has never been addressed by this or any court.[12] The

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12. In Hastings, the court of appeals recognized that such limited immunity might well be mandated by common-law as well as constitutional principle. 681 F.2d at 711, n.17. Although it did not decide the question, it concluded, "The existence of this limited impunity would further counsel against the creation of the absolute immunity claimed by Judge Hastings." Id.

The special panel that heard Judge Claiborne's first appeal concluded that the district court's refusal to review that claim was not immediately appealable and denied review on that basis. Claiborne I, A. 30-31; see also, Claiborne v. United States, 104 S.Ct. 1463 (stay denied)(Rehnquist, Circuit Justice, in chambers). A different special panel heard the appeal from the conviction and dismissed the claim as "disingenuous" without further discussing the merits. Claiborne II, A. 8-9.

claim should be addressed here.

This Court has invariably recognized the need to maintain the separation of powers necessary to preseve the ability of officers of each branch to execute their core constitutional functions. The Court has consistently found that preserving the appropriate separation requires that some limitations be imposed upon an exercise of powers by one branch where that exercise has inter-branch consequences. The explicit protection provided by the Speech and Debate Clause (U.S. Const., art. I, § 6, cl. 1) were so construed and applied in Brewster.

But this Court has also recognized that a similar balancing of interests is necessary in the absence of explicit protections. Thus, in United States v. Nixon, 418 U.S. 200 (1974), this Court recognized that the nature of the presi-

dential function required that the holder of that office be accorded protections beyond the minimum protections afforded all citizens by the Due Process Clause when the courts were asked to exercise the judicial power to enforce a grand jury subpoena. The Court reached a similar conclusion in holding that the protections established by the Speech and Debate Clause required that limitations be imposed upon the grand jury's power to question a Congressman's staff in Gravel v. United States, 408 U.S. 606 (1972). The Court has also determined that the Constitutional scheme requires that executive officers be afforded such special protections from civil actions in the courts as are necessary to enable them to execute their offices properly, even in the absence of explicit protections. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731

(1982) (President); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (assistant to President); Butz v. Economou, 438 U.S. 478 (1978) (cabinet officer).

The principles underlying those decisions require that a similar analysis and a balancing of interests be undertaken when the Executive determines to exercise its broad prosecutorial powers against an article III judge. In contrast to an executive decision to prosecute an executive officeholder, an intra-branch exercise of power, an executive decision to prosecute a federal judge is an inter-branch exercise of power. The power is one whose exercise must disrupt the courts. It is a power whose exercise clearly can be improperly used. It is a power whose exercise can be used to coerce and whose availability creates the potential for chilling judicial independence.

This Court should undertake the analysis here to determine whether any special protections are necessary to protect a federal judge from exercises of executive power that are motivated and directed against his execution of the judicial office.

2. The admitted facts presented by this case enhance the reasons why review on this question should be granted here. In addition to the separation-of-powers claim presented in this Court, Judge Claiborne filed motions in the district court challenging the prosecution and indictment as the product of abuses of the prosecutors' and the grand jury's powers that could not withstand scrutiny even under the standards this Court has found implicit in the Constitution requirements of a grand jury indictment and of due process. See, e.g., United States

v. Russell, 411 U.S. 423 (1973), and Hampton v. United States, 425 U.S. 484 (1976) (recognizing existence of due process limitations on prosecutorial conduct); see also, e.g., United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); United States v. Falk, 479 F.2d 66 (7th Cir. 1973) (evidentiary hearing required upon proper allegations of discriminatory bad faith prosecutions). The district court denied those motions without hearing evidence. As the case progressed, however, that court did hold evidentiary hearings on specific abuses of the grand jury that became apparent. Even on the limited record so created, the special panel acknowledged that three strong claims of abuse had been shown -- the use of three consecutive grand juries to obtain indictment (A. 27-31); use of Conforte's suspect testimony before third grand jury to

obtain the indictment that included the tax evasion counts (A. 9-23); and the employment of five IRS and FBI agents as "grand jury agents" (A. 31-40). The panel affirmed the conviction because it held that these abuses were inadequate to satisfy standard imposed when an individual seeks to invalidate an exercise of the prosecutorial discretion or to establish that the trial judge abused his discretion in denying relief.

Thus, it is clear on this record that the Executive did abuse its powers and those of the grand jury in investigating and prosecuting Judge Claiborne. Those findings corroborate the substantiality of Judge Claiborne's other allegations. Because it misperceived the separation-of-powers claim, however, the special panel did not undertake to determine whether separation-of-powers principles

required that the Executive be held to a higher standard when a federal judge alleged that the abuses were motivated by a bad-faith intent to attack him as a judge for the manner in which he exercised the judicial power. This Court should grant review to undertake the analysis and provide authoritative guidance on this question. It should do so before a United States judge who has properly asserted the claim goes to jail.

3. There is also serious intra-branch aspect to the second question. The criminal prosecution of a federal judge must (as it has here) result in substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings.[13] In

13. This is not the first petition that has identified these concerns in this Court. They were developed and set in the context of this Court's decisions in Hastings Petition at 25-27; see also,

itself, given the stakes and the fact that judicial prosecutions appear to have become recurring events, that should be enough to call for guidance from this Court in the exercise of its supervisory powers. But the manner in which this and other cases involving federal judges have been handled has caused concerns about the impartiality of the process within the courts as well as among outside observers.[14]

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13. (Continued)
Petition for Writ of Certiorari at 20-26, Claiborne v. United States, 105 S. Ct. 113 (1984); Petition for Writ of Certiorari at 36-44, Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 S. Ct. 254 (1984) (all denied). This is, however, the first petition to present those concerns to this Court on a record that concretely demonstrates them.

14. See, e.g., Claiborne II, A. 127-35 (Fergeson, circuit judge, dissenting from denial of rehearing en banc)(concluding that the decisions in this case raise the concern), and Hastings v. Judicial Conference of the United States, 707 F.2d 1093, 1104-05 (D.C. Cir. 1985)(Edwards, circuit

As Judge Ferguson's dissent makes clear, a fair review of the record demonstrates that the concerns are concretely presented here. However the balance is to be struck, only this Court can do the striking. The issue is not whether the Court will have to address and resolve these questions; it is when. Petitioner respectfully submits the time is now.

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14 (Continued)

judge, concurring in result)(eloquently expressing similar concerns in a related context); see also, e.g., J. Riley The Deal Conforte Cut: Is it Legal, Nat'l L.J., Jan. 23, 1984, at 30 (questioning judicial cooperation necessary to enable prosecutors to obtain fugitive brothel owner's testimony to prosecute federal judge), and D. Pike, Judicial Discipline on Trial, Nat'l L.J., Dec. 19, 1983, at 1, 26-27 (commenting upon reactions to disciplinary proceedings against Judge Hastings and differences in rules adopted by different circuits); see also, Notes, Indictment of Federal Judges: Chilling Judicial Independence, 35 U. Fla. L. Rev. 296 (1983).

III. The Third Question Presented

1. This case presents the Court with an important opportunity to clarify the standards that the lower courts are to apply in determining whether the post-trial discovery of material evidence that was withheld requires that the defendant be afforded a new trial. In United States v. Bagley, 105 S.Ct. 3375 (1985), the Court held that the withholding of impeachment evidence did not require automatic reversal under Davis v. Alaska, 415 U.S. 309 (1974). It reversed the court of appeals's decision on that basis and remanded the case to the court of appeals to determine "whether there is a reasonable probability that, had [the withheld information] been disclosed to the defense, the result of the trial would have been different." Bagley, 105 S.Ct.at 3385. Six Justices further agreed

that the correct standard required reversal "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." Id. at 3381. This Court did not, however, itself apply the standard, and the courts of appeals and district courts have not received any authoritative guidance illustrating how the standard is to be applied.

The present case presents a proper record for this Court to provide the necessary guidance. The offense charged required that the prosecution prove the defendant's state of mind beyond a reasonable doubt -- to prove that the defendant willfully intended not to disclose a portion of his income at the time he signed the returns that his accountants had prepared. Because Judge Claiborne took the stand and testified that he had

disclosed the income to his accountants and had relied upon their judgment, the prosecution had to satisfy the jury beyond a reasonable doubt that Judge Claiborne was lying. The strongest single piece of evidence that Judge Claiborne produced to corroborate his testimony was the April 11, 1980, letter by which he testified that he had disclosed the unreported income to Wright, the accountant who prepared the 1979 return. His secretary testified she delivered the letter to Wright. If the jury believed this testimony, it is highly probable, seemingly almost certain, that it would have found Judge Claiborne not guilty on that count. Moreover, the jury would have had additional evidence tending to support Judge Claiborne's testimony that he acted in good faith in relying upon Watson after having made similar disclosures in 1981,

creating a substantially enhanced probability that he would not have been convicted on that count.

The prosecution sought to establish beyond a reasonable doubt that Judge Claiborne had lied by introducing Wright's testimony. Wright testified unequivocally that he had no recollection of ever having seen the 1980 letter. More damning, Wright testified on cross-examination that to his recollection "no document was ever lost in [his] office" and "no document relating to Judge Claiborne's tax matters was ever lost or mislaid in [Wright's] office." The factual questions thus presented were so close that, with similar testimony before it, the first jury had been unable to reach a verdict on either count.

The present petition asks this Court to give content to the Bagley standard by

applying it to a concrete set of facts. Prior to Wright's testimony the government had submitted the summaries prepared by FBI and IRS agents to the trial judge. In those summaries, the agents reported that Wright had told them that by 1981 he had concluded that Claiborne had retained another accountant and that, when Wright had moved offices that year, he had thrown out copies of customer receipts from Judge Claiborne's former practice and the pre-1976 journals that the Wrights had prepared for Judge Claiborne's law practice.

That information was clearly material. Defense counsel could have used it to undermine Wright's credibility on cross-examination or by calling the agents to testify that he had given them prior statements that were inconsistent with his testimony at trial. Moreover, the interviews had taken place a year-and-a-half

before the trial, when Wright's recollections should have been fresher. With the statements, defense counsel could have presented evidence providing a basis from which jurors might have inferred that there was a reasonable possibility that the 1980 letter was lost or thrown out when Wright moved offices in 1981. The jury would have been required to consider both possibilities in determining whether the prosecution had excluded every reasonable doubt about Judge Claiborne's state of mind at the time he signed the returns.

This Court should grant review to determine whether a court of appeals may find a lack of the requisite prejudicial effect when the trial court had withheld evidence that undermines the crucial testimony of a key prosecution witness in a close case. In so doing, it would give content to a standard that whose proper

administration is fundamental to preserving the trial as a search for correct and just results.

2. There is a further reason why this Court should grant review to consider the third question in this case. The procedures followed and the standards applied in the courts below substantially departed from the procedures and standards that are the normal incidents of a fair trial. Neither the trial judge nor the special panel independently reviewed many of the submitted documents, and that was wrong. The trial court and the special panel ruled as a matter of law that unexamined summaries of witness statements prepared by FBI and IRS agents were not "statements" within the meaning of the Jencks Act. This determination was made without affording the defense any opportunity to inquire to determine the

accuracy of the summaries, or whether the witness had read or adopted them. The decision and the procedure by which it was reached were wrong. The court of appeals ruled that withholding summaries suggesting that a key prosecution witness may have perjured himself in giving crucial testimony against the defendant did not prejudice the defendant sufficiently to require a new trial. That decision was wrong.

The failure of either court to conduct a de novo review of the documents submitted and the failure of the trial court to examine or disclose their existence at a time that would have permittted some inquiry into the circumstances in which the summaries of the witness statements were prepared seemingly conflict with this Court's decisions in Campbell I and Goldberg. In determining that the trial

court's failure to disclose the summaries of the accountant's statements did not require a new trial, the special panel failed to apply the standard this Court articulated in Bagley. Moreover, the panel adopted a construction of this Court's decisions in Brady and United States v. Agurs, 427 U.S. 97 (1976), that would render the values that underlie those decisions largely illusory. These decisions alone were departures from the standards that this Court has found necessary to preserve a fair criminal trial system. As a precedent, the panel's opinion approves procedures and standards that can only produce mischief and error in future cases. Standing alone those factors would fully justify review in this Court.

Accordingly petitioner submits that constitutional considerations justify review in this case. We ask that the Court grant his petition.

Respectfully submitted,

Robert S. Catz
Cleveland, Ohio

Terence J. Anderson
Counsel of Record
c/o University of Miami
School of Law
Coral Gables, Florida
33124-8087
(305) 284-2971

Oscar B. Goodman
Las Vegas, Nevada

attorneys for petitioner.

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No. 85-1197

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY EUGENE CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Acting Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes.

2. Whether petitioner was the victim of selective prosecution or grand jury abuse.

3. Whether the court of appeals properly held that neither the Jencks Act, 18 U.S.C. 3500, nor the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, governing disclosure of materials or information in the possession of the government, entitled petitioner to reversal of his conviction.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A85) is reported at 765 F.2d 784. An earlier decision of the court of appeals in this case (Pet. App. A86-A124) is reported at 727 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1985. A petition for rehearing was denied on December 10, 1985 (Pet. App. A125-A126). The petition for a writ of certiorari was filed on January 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 8, 1983, a seven-count indictment (Pet. App. A137-A148) was returned against petitioner in the United States District Court for the District of Nevada.

Count One of the indictment charged that petitioner, a United States District Judge for the District of Nevada, solicited and received a bribe from Joseph Conforte, a Nevada brothel owner, in return for favorable disposition of motions in a pending case, in violation of 18 U.S.C. 201(c). Count Two charged that petitioner caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte, in violation of 18 U.S.C. 1343. The scheme to defraud allegedly involved petitioner's false representation that he could secure the reversal of the criminal convictions of Joseph and Sally Conforte by bribing one or more judges of the United States Court of Appeals for the Ninth Circuit in return for $100,000 ($55,000 of which Conforte allegedly paid). Pet. App. A87-A88, A138-142. Count Three charged that petitioner obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating petitioner, in violation of 18 U.S.C. 1503. Counts Four through Six charged petitioner with failing to report all of his income on his 1978, 1979, and 1980 tax returns, in violation of 26 U.S.C. 7206(1). Count Seven charged that petitioner knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee, in violation of 18 U.S.C. 1001. Pet. App. A88 n.1.

Petitioner moved to quash the indictment and to dismiss the proceedings against him, asserting that the Constitution prohibits the criminal prosecution of an active federal judge unless he is first removed from office through impeachment (Pet. App. A149-A175). After the district court denied the motion (*id.* at A176), petitioner filed an interlocutory appeal. The court of appeals affirmed (*id.* at A86-A124). The court found that it had jurisdiction to hear an interlocutory appeal on petitioner's claim that a criminal proceeding could not be brought without a prior impeachment (*id.* at

A90-A93) and concluded on the merits that the district court properly denied the motion to quash the indictment (*id.* at A94-A114). This Court denied a petition for a writ of certiorari. No. 83-1992 (Oct. 1, 1984).

Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict (Pet. App. A5). On July 5, 1984, the district court, on the government's motion, dismissed Counts One through Four of the indictment (*id.* at A5-A6). Following his retrial, petitioner was convicted on the two remaining tax counts (Counts Five and Six) and acquitted on Count Seven (*id.* at A1-A2, A6). He was sentenced to concurrent terms of two years' imprisonment and was fined $10,000 (*id.* at A2). The court of appeals affirmed (*id.* at A1-A85).[1]

2. The evidence at trial established the following facts. Petitioner opened a law office in Las Vegas, Nevada, in the late 1940's (Tr. 820-821). By the mid-1970's, petitioner had built up a highly successful practice, earning gross income of $375,752 in 1977 and $240,876 in the first eight months of 1978 (Tr. 926-927). On September 1, 1978, petitioner became a federal district judge, earning an annual gross salary of approximately $54,000 (Tr. 856, 929). By his own admission, his income level dropped "[d]rastically" when he assumed the bench, while many of his expenses, such as alimony payments of $21,000 per year, remained constant (Tr. 929). He found himself, in his own words, "in a financial bind" (Tr. 930). Indeed, in mid-August 1980, he wrote a letter to an attorney requesting immediate payment of a $37,500 legal fee due him because, "[f]or the first time in my life, I am desperately in need of money" (Tr. 72, 84; GX 10).

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[1]Judge Ferguson dissented from an order denying rehearing en banc (Pet. App. A127). Judge Reinhardt and Judge Pregerson later filed dissents from the denial of rehearing en banc.

During 1979 and 1980, pursuant to fee-splitting agreements with two other attorneys in his former office, petitioner received shares of fees for work he had performed on cases before he became a judge (Tr. 18, 21; GXs 6, 7, 9). Petitioner also received legal fee income from other attorneys with whom he had worked on cases (GXs 11, 13). Petitioner received fee income of $41,072.93 during 1979 (Tr. 475-489) and $87,911.83 during 1980 (Tr. 496-501). On his income tax return for 1979, however, petitioner reported only $22,332.87 of his fee income (GX 3; Tr. 177, 471-472). He reported no fee income on his return for 1980 (GX 5; Tr. 492). Evidence at trial showed that petitioner kept a personal record book that reflected the true amounts of his legal fee income (DX 47).

a. The 1979 Tax Year. Petitioner's income tax return for 1979 was prepared by a public accountant and friend, Joseph "Jay" Wright, who had provided a variety of accounting services, including bookkeeping and tax return preparation, to petitioner since 1949 (Tr. 118-121, 162-163, 177, 826). Wright charged petitioner an annual fee of $600 for all of his services (Tr. 1167). Prior to 1979, petitioner had provided substantial financial information to Wright (Tr. 118-120, 215, 829-833), but during that year petitioner began to forward less and less information to Wright (Tr. 152-153, 303).

In early March 1980, petitioner sent Wright a handwritten note in which he asked Wright to prepare a letter to a mortgage company in connection with an application to assume a mortgage. Petitioner stated that he had received earnings from his practice of $46,371.93 in 1979 and $41,000 in January 1980 (GX 28; Tr. 155-158, 854, 935). Subsequently, Wright used the $46,371.93 figure to prepare an application for an extension of time to file petitioner's income tax return for 1979 (GX 30; Tr. 167). On April 11, 1980, petitioner signed the application and gave Wright two

checks in the amounts of $8,000 and $2,500 to cover petitioner's estimated tax balance for 1979 and estimated tax for the first quarter of 1980 (DX 4; GX 30; Tr. 162-167).

On May 22, 1980, Wright again used the $46,371.93 figure in two more letters to mortgage companies (GX 29; Tr. 161-162, 168-169). But at some point between that date and June 15, 1980, petitioner informed Wright that only $22,322.97 of the $46,371.93 represented legal fee income (GX 31; Tr. 169-177, 855, 1200). Wright then used the $22,322.97 figure to report legal fee income on petitioner's tax return (GX 3). In fact, petitioner's true legal fee income was $41,072.93. The difference, $18,740.06, which is the amount of unreported income, reflects petitioner's failure to report to Wright most of the checks for legal fees he received in 1979 (GXs 6, 9; Tr. 475-489).[2]

b. The 1980 Tax Year. Prior to filing his income tax return for 1980, petitioner decided to stop using Wright's services and to utilize those of a new firm called Creative Tax Planning, run by an individual named Jerry Watson (Tr. 884, 968-969). Watson, who was not a college graduate, had worked at various jobs, including insurance sales, encyclopedia sales, and farming, until the late 1970's when he set up a bookkeeping business (Tr. 786-790, 795). Petitioner hired Watson without any inquiry into his background or qualifications (Tr. 961-970).

Following discussions with petitioner about his 1980 tax return, Watson sent petitioner a letter dated April 6, 1981, in which Watson stated that " 'the possibility of taking a loss on your business looks good.' " The "business" to which

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[2]Petitioner claimed at trial that he had reported all of his $41,072.93 income to Wright in a letter dated April 11, 1980 (DX 1). The government's evidence showed, however, that neither Wright nor his secretary had seen this letter prior to its disclosure by defense counsel in November 1983 (Tr. 278-279, 351-352).

Watson referred was petitioner's law practice, the assets of which had previously been completely written off on petitioner's income tax return for 1978. Tr. 798-807, 921-924.[3]

On or about April 13, 1981, petitioner filled out and signed a request for extension of time to file his 1980 tax return, in which he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7). By June 15, 1981, Watson had completed preparation of petitioner's 1980 return (Tr. 807). After looking through the return and discussing it with Watson for ten or fifteen minutes, petitioner signed it (Tr. 814-815, 974-977). Because of his failure to report his fee income, petitioner received a tax refund of $44,356 (GXs 4, 38; Tr. 368-372). Petitioner paid Watson $2,000 for preparing the return, without any additional tax or bookkeeping services (Tr. 782). Watson admitted that the amount of the anticipated tax refund was "a factor" in computing his fee (Tr. 785).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any court of appeals. Accordingly, review is not warranted.

1. Petitioner contends (Pet. 33-43) that the Constitution required his removal from office through the impeachment process before he was subjected to a criminal prosecution. He previously raised this claim in his petition for a writ of certiorari in No. 83-1992, and he fails to point to any

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[3]Petitioner maintained that the fees he received in 1980 were included in $150,000 reported on his 1980 tax return as the price for a reported sale of his law practice. He conceded, however, that fee income could not appropriately be characterized as a capital gain. Pet. App. A41-A42. At trial, the evidence showed that petitioner had experience in tax matters, had personal knowledge of the difference between capital gain and ordinary income, and had for 30 years reported his legal fees as ordinary income (Tr. 914-928).

changed circumstances suggesting that review is now warranted. Accordingly, for the reasons set forth in our brief in opposition to the petition in No. 83-1992, petitioner's claim lacks merit, and his request for review of this issue should again be denied.

2. Petitioner also contends (Pet. 44-49) that the district court improperly denied him an opportunity to prove allegations that the prosecutors were motivated by an intent to drive him from office and punish him for the manner in which he exercised his judicial powers. He further asserts (Pet. 49-52) that, because of his allegations as to the government's motivation in prosecuting him, the court of appeals should have held the government to a higher standard than usual in assessing allegations of grand jury abuse.[4] Petitioner bases his assertions on the doctrine of separation of powers. His position lacks merit.

a. Petitioner's challenge to the government's motivation in prosecuting him is, in essence, a claim that he was the victim of selective prosecution. To prevail on a claim of selective prosecution, a defendant must meet a heavy burden of showing that the decision to prosecute him was both discriminatory in effect and motivated by an impermissible purpose. See, *e.g.*, *Wayte* v. *United States*, No. 83-1292 (Mar. 19, 1985), slip op. 9; *United States* v. *Jennings*, 724 F. 2d 436, 445 (5th Cir.), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Hazel*, 696 F.2d 473, 474 (6th Cir. 1983); *United States* v. *Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981); *United States* v. *Ness*, 652 F.2d 890, 892 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v.

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[4]Petitioner's statement of the question presented (Pet. i-ii) implies that petitioner was denied a hearing as to his allegations of grand jury abuse as well as his complaint regarding the government's motivation in prosecuting him. He concedes (Pet. 50), however, that the district court did hold evidentiary hearings on allegations of grand jury abuse.

Myers, 635 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Diggs*, 613 F.2d 988, 1003 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980). Furthermore, to merit an evidentiary hearing on the issue, a defendant must allege facts sufficient to show the discriminatory effect and raise a reasonable doubt as to the prosecutor's purpose. See, *e.g.*, *United States* v. *Jennings*, 724 F.2d at 445; *United States* v. *Hazel*, 696 F.2d at 475; *United States* v. *Saade*, 652 F.2d at 1135. Petitioner has made no showing of any kind that others who have committed the offenses for which he was indicted have not been prosecuted. And he has presented little, if anything, beyond bare allegations in support of his claim that the government was motivated in the instant case by a desire to drive him from office in retaliation for his judicial decisions (see Pet. App. A153, A168-A170). Petitioner's allegations fall far short of what is necessary to establish a claim of selective prosecution. See *United States* v. *Myers*, 635 F.2d at 940 (conclusory allegation that defendant was "disfavored" legislator insufficient); *United States* v. *Diggs*, 613 F.2d at 1004 n.92 (defendant's "broad assertion" that, as a member of Congress, he frequently came into conflict with the administration insufficient).

Petitioner asserts (Pet. 45) that the separation of powers doctrine requires special protections for the judiciary to prevent the Executive Branch from using its prosecutorial power as a means of coercing judges and chilling judicial independence.[5] But neither the text of the Constitution nor

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[5]Petitioner does not spell out in his petition what special protections he seeks. But implicit in his argument and his statement of the question presented is a contention that an improper motive on the part of the prosecutor should, by itself, require dismissal of an indictment, even if similarly situated persons have been prosecuted, and that bare allegations of an improper motive should be enough to require a hearing. As we discuss in the text, special protections against abuse of prosecutorial discretion are not needed. Moreover, public respect for the law clearly

any other authority supports according judges such special protections, and such protections are unnecessary, given the existing safeguards against improperly motivated prosecutions against judges. In *United States* v. *Brewster*, 408 U.S. 501, 522-525 & n.16 (1972), this Court identified factors that minimized the possibility that prosecutors would bring cases against members of Congress as a means of interfering with the members' independence. These factors are equally applicable with respect to judges. For example, judges are protected by the procedural barriers facing a prosecutor attempting to bring a case—the requirements of persuading a grand jury to return an indictment and of convincing a petit jury beyond a reasonable doubt, with the presumption of innocence favoring the accused (*id.* at 522-523 n.16). Moreover, prosecutors are faced with the courts' substantial control over judicial proceedings and therefore can ill afford to jeopardize their credibility and professional standing by engaging in unjust harassment of judges (see *ibid.*). Also important are "the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct" (*ibid.*) and "the public reaction engendered by any attempt of one branch to dominate or harass another" (*id.* at 523). These barriers to retaliatory prosecutions of judges are sufficient to secure the Judicial Branch against improperly motivated prosecutions.[5]

b. Petitioner implies (Pet. 51) that the court of appeals found that the prosecutors had engaged in grand jury abuse. He asserts (*id.* at 49-52) that, in finding that the alleged abuse did not warrant dismissal of the indictment, the court of appeals erred by treating petitioner's claims of abuse as if

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would suffer if judges, who hold positions of public trust and should be held to a high standard of behavior, are given special privileges to escape prosecution that are unavailable to ordinary citizens.

they had been made by an ordinary criminal defendant. Petitioner asks this Court to resolve the question "whether separation-of-powers principles required that the Executive be held to a higher standard when a federal judge alleged that the abuses were motivated by a bad-faith intent to attack him as a judge for the manner in which he exercised the judicial power" (*id.* at 51-52).

The court of appeals did not in fact find grand jury abuse. Relying on this Court's opinion in *United States* v. *Thompson*, 251 U.S. 407, 413-414 (1920), which held that adverse action or failure to act by one grand jury does not limit or exhaust a successor grand jury's power to investigate, and Fed. R. Crim. P. 6(e)(3)(C)(iii), which authorizes transfer of one grand jury's material to another grand jury without a court order, the court of appeals held that the government's presentation of evidence to three grand juries was not improper (Pet. App. A28-A29). The court also rejected petitioner's contention that the prosecution had knowingly presented perjured testimony of Joseph Conforte to the grand jury (*id.* at A19-A21). The court pointed out that petitioner had made no showing, beyond mere speculation, that Conforte had given perjured testimony, and no "showing that the Government had any reason to believe that Conforte's testimony was perjured" (*id.* at A19 (footnote omitted)).[6] Finally, the court rejected petitioner's claim that IRS and FBI agents were improperly used as " 'grand jury agents' " (*id.* at A31-A40). The court held that

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[6]Moreover, as the court of appeals also held (Pet. App. A21-A23), even if Conforte perjured himself, his grand jury testimony was not material or prejudicial to petitioner. The testimony did not relate to the tax counts or the ethics count, there was sufficient non-perjured evidence to justify indictment of petitioner on those counts, and Conforte did not testify at petitioner's second trial. Thus, Conforte's grand jury testimony could not warrant dismissal of the indictment. See *United States* v. *Morrison*, 449 U.S. 361 (1981). See also *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).

the disclosure of grand jury material to the agents was authorized (*id.* at A37-A39), that there was no unauthorized presence of the agents during grand jury proceedings (*id.* at A39), and that the employment of the agents did not override the independence of the grand jury. Petitioner points to nothing suggesting that these determinations of the court of appeals were incorrect or are in conflict with a decision of any other court of appeals. In any event, none of these claims of grand jury irregularity survives petitioner's conviction by the petit jury at a valid trial. *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986).[7]

3. Finally, petitioner contends (Pet. 55-63) that he was prejudiced because the district court withheld from him FBI and IRS summaries of interviews with petitioner's tax return preparer, Joseph Wright. He suggests the summaries were statements by Wright subject to disclosure under the Jencks Act, 18 U.S.C. 3500, and that they contained material exculpatory information to which petitioner was entitled under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny. The court of appeals properly rejected these claims (Pet. App. A61-A78).

Petitioner bases his claim of prejudice on a statement in the interview summaries that suggests that Wright may have misplaced, destroyed, or thrown away some of petitioner's pre-1976 tax records when Wright moved to a new

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[7]Petitioner also posits (Pet. 52-54) that the disruption of judicial business resulting from the prosecution of a judge is a factor this Court should consider in deciding whether to review this case. However, it is petitioner's criminal conduct, which the jury found proven beyond a reasonable doubt, rather than the prosecution of petitioner, that is responsible for any disruption of judicial business here. Petitioner also questions (Pet. 53) the impartiality of the judicial process in cases involving judges. But at bottom, he simply suggests that judges are entitled to special treatment. Plainly, a judicial system does not lack impartiality because it fails to accord special rights and privileges to judges accused of committing criminal offenses.

office (Pet. App. A62-A63). At trial, petitioner testified that he had sent Wright a letter accurately disclosing his 1979 income from legal fees (*id.* at A45-A46, A62-A63, A70-A71). Wright testified that he had not received such a letter and that he had not lost or misplaced any records pertaining to petitioner (*id.* at A63). Petitioner contends that the information contained in the interview summaries could impeach Wright's testimony on the question whether Wright destroyed or misplaced records (Pet. 60).

The court of appeals correctly determined that the interview summaries were not statements qualifying for disclosure under the Jencks Act (Pet. App. A64-A68).[8] It also concluded (Pet. App. A68-A70) that any error in the district court's refusal to disclose the summaries pursuant to the Jencks Act was not prejudicial. As the court observed, petitioner cross-examined Wright, at petitioner's first trial, concerning Wright's loss of records resulting from his move to a new office. Thus, petitioner plainly knew of the loss and made use of his knowledge without access to the summaries. Moreover, the records destroyed pertained to pre-1976 work, which would have had no bearing on the crimes charged. Under these circumstances, the court correctly determined that any error was harmless. See *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959). This factbound determination does not warrant further review.

Petitioner's *Brady* claim must fail for similar reasons. Under *Brady*, the government must disclose evidence that is both favorable to a defendant and material to guilt or punishment. 373 U.S. at 87. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule. See *United States* v. *Bagley*, No. 84-48 (July 2, 1985). In

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[8]The interview summaries were not statements made or adopted by the witness, a verbatim transcription of an oral statement, or grand jury testimony. See 18 U.S.C. 3500(e).

Bagley, this Court held that a conviction must be reversed on *Brady* grounds "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" (slip op. 10). Here, there is no reason to believe that telling petitioner what he already knew could have changed the result of his trial.[9]

Thus, the court of appeals correctly rejected petitioner's claims under the Jencks Act and the *Brady* rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Acting Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

MARCH 1986

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[9]Petitioner asserts (Pet. 55-61) that this Court should clarify the *Bagley* standard by applying it to the specific facts of this case but points to nothing suggesting either a need for clarification or any basis for doubting the correctness of the decision in this case. Indeed, given the "inherently factbound nature of the cases to which it will be applied" (*Bagley*, slip op. 1 (White, J., concurring)), there is little to be gained from application of the standard by this Court to this particular set of facts.

DOJ-1986-03

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No. 85-1197

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX
SUBSEQUENTLY FILED OPINIONS

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein & Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record

c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner

39pp

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STATEMENT CONCERNING SUBSEQUENTLY FILED OPINIONS BELOW

The petition for writ of certiorari was filed on January 15, 1986. Since that date, two more judges in active service on the United States Court of Appeals for the Ninth Circuit have filed opinions stating reasons why they dissented from that court's denial of petitioner's suggestion that the case be reheard en banc. These opinions are set out in this supplemental appendix. United States v. Clairborne, No. 84-1294 (9th Cir.) (dissenting opinion of Reinhardt, Circuit Judge, filed January 30, 1986), S.A. 1-33; Id. (dissenting opinion of Pregerson, Circuit Judge, filed February 10, 1986), S.A. 34. The three dissenting opinions have now been reported in the temporary edition of the Federal Report-

er. United States v. Claiborne, 781 F.2d (No. 3) 1325 (9th Cir. Dec. 30, 1985) (Ferguson, Circuit Judge); id. at 1327 (Jan. 30, 1986) (Reinhardt, Circuit Judge); and id. at 1334 (Feb. 10, 1986) (Pregerson, Circuit Judge).

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Jan. 30, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION

UNITED STATES v. CLAIBORNE, NO. 84-1294

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from the court's refusal to hear Judge Claiborne's appeal en banc.

This case is a most unusual one in a number of respects. It raises serious questions about the fair and impartial administration of justice.

I

BACKGROUND

United States District Judge Harry E. Claiborne was originally indicted and tried in the United States District Court on four counts involving his alleged acceptance of bribes in the performance of

his official duties, two counts of tax evasion unrelated to the alleged bribes, and one count of filing a false financial statement with the Judicial Ethics Committee. The false filing count was also unrelated to the bribery charges. The first jury was unable to reach a verdict on any of the counts, and a mistrial was declared. The government then dropped the most serious charges -- the allegations relating to bribery -- and Judge Claiborne was retried only on the unrelated tax and false filing counts. The second jury acquitted him of filing a false financial statement, but convicted him on the tax charges.

Judge Claiborne was tried before an out-of-circuit senior district judge specially assigned to preside over his case. The district judge sentenced him to a two-year term of imprisonment. A

specially selected panel composed of three judges from other circuits affirmed his conviction. 765 F.2d 784. Judge Claiborne petitioned for a rehearing and suggested a rehearing en banc. The special panel denied the petition for rehearing and recommended that we reject the suggestion for a rehearing en banc. An active member of this court then called for a vote by the full court on whether to rehear the appeal en banc. The full court has now voted, and decided not to grant Judge Claiborne a rehearing.[1]

Throughout these proceedings, Judge Claiborne has claimed that his investigation and prosecution constituted a part of an effort by the Department of Justice's Organized Crime Strike Force and the F.B.I. to discredit him personally and

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1. As is explained at p. 9, infra, six out of 25 active judges recused themselves and did not participate in the vote.

bring about his removal from the bench. Prior to his appointment in 1978, Judge Claiborne has been a prominent trial lawyer and had defended numerous individuals accused of committing criminal offenses. He contends that after his appointment the government launched a vendetta against him as a result of his issuance of a number of significant rulings adverse to the Department of Justice in criminal cases.

The Strike Force and the F.B.I. appear to have begun investigating Judge Claiborne in early 1980. According to Claiborne, in the Spring of 1980 he was investigated by a Las Vegas grand jury at the request of those agencies. The investigation related to Claiborne's actions as a criminal defense attorney, particularly with regard to whether Claiborne participated in illegal wiretapping activities.

Apparently the investigation proved fruitless and the grand jury, after several months of hearings, failed to return an indictment against Judge Claiborne. However, a local law enforcement officer who had supplied evidence exculpating Judge Claiborne was demoted to a desk job and was himself investigated by the F.B.I.

On April 4, 1980 United States Marshals seized from the offices of the Strike Force a display satirizing Judge Claiborne and Chief Judge Foley. Claiborne's attorney had complained that the exhibit was intimidating and prejudicing members of the grand jury that was investigating the Judge, as well as witnesses who were testifying before the grand jury. At a subsequent hearing,

Judge Foley described the display as "contemptuous" of the judicial process and the result of "gross misconduct."

Judge Claiborne alleges that the F.B.I.'s next step, taken in late 1980, was to launch another investigation of him on a different subject, and this time to open his mail. Judge Claiborne claims that when he unsealed an envelope he had received through the mail it contained not only the enclosure intended for him but also an enclosure sent to another individual, a person who was also a target of the then current F.B.I. investigation. According to Claiborne, that investigation concerns his sentencing of Gus Gallo, a convicted bookmaker, and resulted from the belief of some Justice Department officials that Gallo had not received a sufficiently severe sentence. The Gallo investigation also apparently came to nought.

Next, the government obtained statements from one Joseph Conforte that Judge Claiborne had solicited and accepted bribes from him. Based on Conforte's statements, the Strike Force, the F.B.I., and the Internal Revenue Service commenced still another investigation of Judge Claiborne. Conforte was the long-time owner of the Mustang Ranch brothel in Storey County, Nevada, a former client of Judge Claiborne's and a fugitive from justice. Conforte had been sentenced to 20 years in prison after being convicted of four counts of failing to withhold federal income taxes from the salaries of certain of his employees. According to newspaper articles contained in the court record, Conforte's first charge against Claiborne was that he had bribed him in connection with the Judge's adjudication of certain post-trial motions in Conforte's criminal

case. That charge apparently collapsed when it was determined that Judge Claiborne had never presided over or ruled on any aspect of Conforte's case, and that the motions had been decided by a district judge from California prior to Judge Claiborne's appointment to the bench.

Undiscouraged, the government began pursuing two other claims by Conforte that he had bribed the Judge. One of these bribery charge (sic) related to Judge Claiborne's treatment of certain subpoenas issued to employees of Conforte in a voting fraud investigation. The other involved a bribe supposedly paid to the Judge so that he would secure a favorable outcome in Conforte's appeal from his tax conviction; at the time of this alleged bribe the appeal was pending before a panel of this court. We ultimately affirmed Conforte's conviction, but

remanded for resentencing on three of the counts. United States v. Conforte, 624 F.2d 869 (9th Cir. 1980). The Supreme Court denied a writ of certiorari, 449 U.S. 1012 (1980), and shortly afterwards Conforte fled to Brazil.

The District Director of the Internal Revenue Service in Reno, Nevada, who was fully familiar with Conforte's background and record, opposed the investigation of Judge Claiborne, because it was based almost exclusively on Conforte's statements. In early 1982, the F.B.I. and the Internal Revenue Service launched a "sting" operation involving an attempt to bribe the District Director. In late 1982, after the plan to "bribe" him had failed, the District Director was transferred to another office. A Treasury Department investigator later condemned the F.B.I. - I.R.S. sting operation as

"very dangerous, misleading and poor work."

Beginning in September 1982, the F.B.I. and the Department of Justice presented their case against Judge Claiborne to a grand jury in Portland, Oregon. Conforte did not testify because he was still a fugitive from justice. The grand jury failed to return an indictment.

The government's allegations were presented to a second grand jury in Portland beginning in early 1983. Conforte remained a fugitive. The grand jury once again failed to return an indictment.

Meanwhile, Conforte had been attempting for some time to negotiate a deal with the government. In late 1983 an agreement was reached under which Conforte would return from Brazil and be resentenced to four concurrent terms of five years each, 15 months of which were to be actually

served in prison, while the remainder would be suspended. In addition, the government agreed to drop federal bail-jumping charges and persuade Nevada state officials to drop certain state charges against Conforte, as well as convince state prosecutors to agree to concurrent sentences on all remaining state charges.

Conforte returned to this country on December 4, 1983. In the meantime the government has presented his charges against Judge Claiborne to still another grand jury. This time, however, the government did not proceed in Portland, but chose Reno, Nevada as its forum. Conforte testified before the Reno grand jury three days after his return. The following day the grand jury returned a seven count indictment against the Judge.

One week after Judge Claiborne's indictment, Conforte was resentenced by

Judge John Lewis Smith of the United States District Court for the District of Columbia. Conforte's case had been transferred to Judge Smith in October 1982 by order of the Chief Justice of the United States after the District Judge in Nevada who had previously presided over the case recused himself. The reduction in Conforte's sentence may well have violated Fed. R. Crim. P. 35, see United States v. Hetrick, 644 F.2d 752 (9th Cir. 1980); United States v. Pollack, 655 F.2d 243 (D.C. Cir. 1980), as well as 18 U.S.C. § 3651 (1982), not to mention the Justice Department's policy on tardy motions to reduce sentences.

Senior United States District Judge Walter E. Hoffman, of the Eastern District of Virginia, was specially designated by the Chief Justice to preside over Judge Claiborne's trial. In early 1984, Judge

Hoffman denied a series of pretrial motions filed by Claiborne. (Previously, Judge Hoffman had been specially designated by the Chief Justice to preside over the Portland and Reno grand jury investigations. These designations, like the trial designation, were made following a request by the Chief Judge of this circuit that an out-of-circuit district judge be appointed.) An appeal to this court followed.

At the time of the pre-trial appeal, the case against Judge Claiborne still included the charges relating to his alleged acceptance of a bribe intended to influence the results in an appeal before one of our panels. We as a court agreed, although in a rather informal manner, to recuse ourselves from hearing Judge Claiborne's pretrial appeal. The Chief Justice then specially selected a panel of

three judges from other circuits to hear it. The special panel affirmed the pretrial rulings of the specially assigned district judge. 727 F.2d 842, cert. denied, 105 S. Ct. 113 (1984).

The trial then proceeded, with Joseph Conforte as a key government witness. Despite, or perhaps because of, Conforte's testimony the jury could not agree on a verdict on any of the counts.

Because the government abandoned the bribery charges prior to the second trial, Conforte did not testify the next time the prosecution sought to convict Judge Claiborne. Judge Hoffman once again presided over the trial. After the jury returned a guilty verdict on the tax charges, Judge Claiborne again appealed. This time we took no action to recuse ourselves. In fact, we did nothing at all. Although the bribery charges that

indirectly involved our court in the proceedings were no longer a part of the case, we simply failed to consider, formally or informally, the question whether we now had an obligation to hear the appeal or whether a new special panel should be appointed. Apparently acting on the assumption that our prior recusal was a continuing one, the Chief Justice specially selected another panel of three judges from other circuits to hear the appeal.

II

ANALYSIS

It is clear to me that there was no reason in fact or law why a panel of judges of this court could not have heard Judge Claiborne's post-conviction appeal. The bribery charges had been dropped; the

tax charges were unrelated to any alleged bribe and they in no way involved any member of this court. Moreover, our subsequent actions, specifically our en banc vote, show quite plainly that the overwhelming majority of the judges of our court believed that they were not required to recuse themselves from voting on a critical aspect of the proceedings on appeal. Our vote on the en banc call reveals that 19 members of this court, out of a then total of 25, concluded that it was proper for them to vote on the question whether or not Judge Claiborne's appeal should be given en banc consideration. Only six thought they were required to recuse themselves from participating in that decision. Because in my view there can be no distinction drawn between the propriety of a judge's voting on a call for a hearing en banc and the propriety of

a judge's hearing the appeal itself, I believe, that any three of the 19 judges of our court who voted on the en banc call could properly have heard the post-conviction appeal. Thus, in actuality, there was no need for the appointment of any out-of-circuit judges.

In my view, it is clear that we as a court committed a serious error in our handling of this case, an error with serious consequences. Specifically, we erred when we failed to consider whether we should hear Judge Claiborne's appeal from his conviction or whether, instead, the appointment of a second special panel was required. Because of our error, outside judges were appointed to hear an appeal that we had an obligation to hear ourselves. Our court system is structured so that a defendant will normally have his trial and any appeals heard by judges

residing in the circuit in which the charged crime was allegedly committed. Here, we erroneously, albeit inadvertently, deprived Judge Claiborne of this feature of our laws; en banc consideration of the Judge's case would have been a proper means of at least partially remedying our mistake.

Rehearings en banc provide a means for ensuring that the law of our circuit is applied not only consistently but correctly. Here, as a result of our failure to act, judges from other circuits, not as familiar as we are with the precedents of our court, considered a case that we had a duty to hear.[2] Judge Claiborne's appeal raises several issues

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2. While circuit judges from other circuits and district judges sit on Ninth Circuit panels, title 28 requires that at least two of the judges on any panel be judges of this court. 28 U.S.C. § 46(b)(1982). See also Ninth Circuit General Order 3.2(a) (same).

of importance.[3] In disposing of at least one of those issues, the special outside panel cited no authority from any appellate court, let alone a decision by the judges of this court. The special panel also stated that it was not following the result reached in two of the three district court opinions that it cited. 765 F.2d at 794-95. In my view, when a substantial question of law not previously decided by the judges of this court is decided by a panel of outside judges and we subsequently recognize that we have erred in failing to decide that question ourselves, it is our responsibility to grant en banc reconsideration. Moreover, in this case there are additional reasons why we should have granted an en banc hearing. See infra at pp. 14-16.

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3. See Judge Ferguson's companion dissent for a discussion of two of those issues.

Some of the members of this court who voted against an en banc hearing may have believed that an appearance of impropriety would arise if we were to review the conviction of a district judge who sits within the geographical boundaries of the Ninth Circuit; they may have thought that a decision to hear Judge Claiborne's case en banc would be ill-advised since it might cause some to think less well of our court, or of courts in general. I respectfully suggest that a vote influenced by such institutional concerns would unfairly prejudice Judge Claiborne's rights and contravene basic principles governing the law of recusal.

Courts must always strive to administer justice in a manner such that there is no appearance of either impropriety or injustice. At the same time, a court must never deprive a person of his right to

just treatment or the opportunity to avail himself of the full procedural rights or protections to which he is entitled. Certainly it must not do so merely because a judge believes that it may appear to some persons that in affording an individual those rights the court has acted improperly. Our highest duty at all times is to provide justice to all litigants; no other principle is as important.

Normally, there is no conflict between our duty as individual judges to appear impartial and our obligation to afford justice to all. In those cases in which there is a conflict, there is usually some method of ensuring that both goals can be accomplished within the normal procedures governing the operation of the judicial system. For example, a trial judge faced with such a conflict can recuse himself, and another trial judge

can be substituted. So, too, a circuit judge can, normally, readily be replaced by another circuit judge or even by a district judge. There are, however, a few cases in which there is no mechanism for resolving the conflict in a manner that allows the court to honor both obligations fully. In such cases the obligation to do justice prevails and the "rule of necessity" applies. Under that rule, the court must hear the case and do justice even though an appearance of interest or impropriety may exist. See United States v. Will, 449 U.S. 200, 213-217 (1981).

The fact that Harry Claiborne is a United States District Judge does not mean that he is less entitled than any other individual to the full benefit of the orderly procedures of this court. Those procedures, including en banc consideration, have been established to ensure that

justice is done. Our en banc process is also designed, as I noted earlier, to ensure that the law of this circuit will be applied uniformly to all defendants. Judge Claiborne has just as much right to have his case considered en banc as any other defendant. En banc proceedings are different in one critical respect, however, from all other proceedings this court conducts: only the judges of our court can hear a case of ours en banc. There is no procedure in current law for obtaining an out-of-circuit en banc panel. This is true even when an appeal is heard initially by a specially selected panel of out-of-circuit judges. Thus, if in fact an appearance of impropriety existed here, the rule of necessity would apply, and we would be required to disregard that appearance. Accordingly, if a factor in our decision to deny Judge Claiborne en

banc consideration of his case was our concern over an appearance of impropriety, we have, in my view, seriously misconstrued our duty as judges of this circuit. In doing so, we have, unfortunately, also denied Judge Claiborne equal justice.

Moreover, had we agreed to rehear Judge Claiborne's case en banc, there would have been neither any actual impropriety nor any appearance of impropriety in our doing so. In my opinion, the public has the identical perception of a court of appeals' reviewing a district judge's conviction whether the appellate judges come from the same geographic area as the district judge or not. To most people the appearance would be similar whether the appellate judges were from the Ninth Circuit, or from the Second, Seventh or Tenth Circuits. If there were any appearance of impropriety in our hearing

Judge Claiborne's case, it would stem from the fact that we are all judges together, all members of the "judicial fraternity", not from the happenstance of our physical locations.[4] Yet, no one has suggested that the special panel of circuit judges did not act in a proper and impartial manner, or that an appearance of impropriety exists because that panel might have favored Judge Claiborne. I believe the public is sophisticated enough to accept the fact that if a judge is to be tried, he will be tried before colleagues who are members of the same profession and that those colleagues may in some cases even reside in the same section of our nation. In short, I do not believe that reasonable persons would have had cause to

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4. Of course, if an individual judge has a particular personal or professional relationship with the defendant, individual recusal may be required.

think that any impropriety might have existed had we, as a court, simply followed our regular procedures and heard Judge Claiborne's post-conviction appeal in the normal course.

There is, however, an appearance of impropriety or injustice in this case - one that I fear a majority of my colleagues may fail to recognize. That "appearance" does not militate against affording Judge Claiborne en banc consideration; rather, it strongly militates in favor of granting him a hearing. Our refusal to do so allows the record to rest with the appearance that Judge Claiborne may have been the object of adverse special treatment and, thus, the victim of injustice. Judge Claiborne is one of the few criminal defendants in the Ninth Circuit, if not in the nation, whose case has been handled, both in the District Court and in the

Court of Appeals, exclusively by judges specially and specifically chosen to hear that particular case.[5] There is, in my opinion, a rather substantial appearance of injustice when a defendant who claims he is the victim of a vendetta on the part of various branches and agencies of the Department of Justice is deprived of the opportunity to be judged by those who would normally preside over his case and instead is tried and convicted before, and has his appeal heard by, judges all of whom are specially selected for their assignments.

There is no doubt that every step taken in appointing the specially designated judges fully complied with all

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5. There are no available statistics regarding the number of cases in which a similar designation of both out-of-circuit district and circuit judges has been made. Informal research makes it clear, however, that the procedure is invoked infrequently.

existing statutes and rules. Moreover, there is no suggestion in this case that there was in fact anything improper about the designation of the judges, or that any of the judges involved in the selection process acted with anything less than the utmost integrity. Nevertheless, in a case in which the defendant contends that he is the object of a prosecutorial vendetta, in which the judges who heard the case were all specially selected under a process that permits the selector total discretion to choose whom he wishes, and in which we as a court erred in permitting the specially selected panel to hear the appeal, I believe that an en banc hearing is required - if for no other reason than to ameliorate, to the extent possible, the appearance of injustice. En banc consideration by the judges of this court, judges who were not specifically selected

to hear Judge Claiborne's appeal, would have gone a considerable way towards accomplishing that objective.

Unfortunately, as events unfolded, only an en banc review by this court or a hearing by the United States Supreme Court could have afforded Judge Claiborne consideration of his case by a tribunal that had all the appearances of fairness. All courts that have previously heard his case are open to the charge that they were specially selected for the purpose of ensuring the desired governmental objective. In my opinion, the proceedings thus far afforded Judge Claiborne fall far short of meeting the "appearance of justice" standard. Because of our obligation to administer justice in a manner that maintains confidence in the fairness and objectivity of the judicial

system, I believe that it was our duty and responsibility to hear his case en banc.

III

THE RULES

As mentioned above, every step taken in this case to appoint the various special judges was taken according to existing and duly promulgated rules. However, in my opinion, we should seriously, and quickly, re-evaluate those rules. Under 28 U.S.C. §§ 291 & 292, the Chief Justice of the Supreme Court must designate and assign a circuit or district judge to act as a circuit or district judge in another circuit upon receipt of a "certificate of necessity" from the chief judge of the circuit to which the judge will be assigned. The Chief Justice may select any judge he wishes; there are no pub-

lished guidelines or standards. Thus, when a certificate of necessity is issued in a specific case or proceeding, there will always be an appearance that the judges designed are being hand-picked to decide the controversy.

This appearance is particularly strong in criminal cases. In my view, the current rules should be modified so that any out-of-circuit judges designated to hear specific criminal cases are selected by a random selection system through procedures that are a matter of public record.

There are various alternatives to the present system that might be considered. For example, the chief judge of each circuit could designate a number of judges who are available for such special assignments. Then, the Chief Justice could select the needed judges in a random

drawing from the pool. Alternatively, a case in which all the judges of a circuit are recused could be assigned to another randomly chosen circuit. The trial judge could be selected according to any random selection procedure used in that circuit. Any appeals could be considered by panels from that circuit selected in the ordinary course. Any petition for a rehearing en banc could then be dealt with by the judges of that circuit in the regular fashion. Numerous other methods of ensuring the appearance of fairness and objectivity in the selection process could certainly be devised.

Of course, problems similar to those discussed above can arise when a chief judge of a circuit designates and assigns a district judge to hold court in another district of that circuit pursuant to 28 U.S.C. § 292(b). A random selection

system could also be devised for use by the chief judge of a circuit when he is required to make such a designation and assignment for purposes of a specific criminal case.[6]

IV

CONCLUSION

For the reasons set forth above, I respectfully dissent from the court's denial of an en banc hearing.[7]

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6. In our circuit, intracircuit assignments of district judges are governed by guidelines, promulgated by the Judicial Council of the Circuit, that prescribed a regular, objective method for selecting judges to be designated to perform services in another district.

7. I, of course, express no opinion as to the outcome were we to consider Judge Claiborne's appeal en banc. For present purposes I need conclude only that en banc consideration is required.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States v. Claiborne, No. 84-1294

Filed February 10, 1986

PREGERSON, Circuit Judge, dissenting from the order denying hearing en banc:

Judges Ferguson and Reinhardt in their dissents raise a number of serious questions calling for en banc consideration. I voted to grant the en banc petition and feel constrained to dissent from our court's refusal to do so.

No. 85-1197

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein and Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record

c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY

The government's brief in opposition is based upon a mischaracterization of the questions presented and an unfair statement of the case. This reply is submitted to assure that the Court is not mislead about the nature or content of the record below.

1. The government's conclusion that there has been no "change in circumstance" since petitioner first presented his claim that the Constitution defines a mandatory sequence of remedies (Br. Op. 6-7) is false.

Petitioner has been convicted, and a sentence has been imposed that would functionally remove him from his district and his office for the period of his incarceration without his having been impeached or removed by the processes the Constitution specifies as exclusive. Cf. United States v. Hastings, 681 F.2d 706, 712 n.19 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983). The conviction and sentence are the changes in circumstance that make review appropriate now. What all have conceded is a substantial constitutional question is now clearly and unavoidably presented in this case. The Court should grant review to resolve that question here.

2. The Honorable Stephen Reinhardt, Circuit Judge, United States Court of Appeals for the Ninth Circuit, has described the specific allegations that Judge Claiborne made to demonstrate that the executive's decision to investigate and prosecute him were motivated in fact by an intent to retaliate

against him for his judicial decisions and to drive him from the bench. United States v. Claiborne, 781 F.2d 1327, S.A. 1-15 (dissenting from denial of rehearing en banc).[1] The government characterizes these as "bare allegations" that do not satisfy the standards of pleading appropriate to a case such as this. Br. Op. 7-8. Either the government or Judge Reinhardt is being less than candid concerning the content of the record below.

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1. The petition was filed on January 15, 1986. On January 30, 1986, Circuit Judge Reinhardt filed an additional opinion dissenting from the denial of rehearing en banc. On February 10, 1986, Circuit Judge Pregerson filed a brief opinion stating that he also dissented from the denial of rehearing en banc. Petitioner subsequently filed a Supplemental Appendix setting out Judge Reinhardt's (S.A. 1-33) and Judge Pregerson's (S.A. 34) opinions.

Petitioner is satisfied to rely upon Judge Reinhardt's description.[2]

Judge Reinhardt's opinion also makes clear the need for this Court to exercise its supervisory jurisdiction in this case to determine whether the special and irregular procedures employed in the courts below were consistent with the right to a fair and impartial trial and review that are afforded citizens other than United States judges. S.A. 15-33. The government ignores the particular irregularities that occurred in this case and the special procedures that have been employed in all prosecutions directed at

---

2. The government also seeks to avoid the second question by ignoring the need for institutional protection for judges. Instead, it suggests the "omnipresence of the news media" provides protection enough. Br. Op. at 9. Were that true in fact, there would have been no prosecution here. Moreover, the government fails to acknowledge that the framers sought to provide institutional protections for judges and the federal courts that would not leave their independence dependent upon the professional responsibility of executive office holders. Cf. id.

federal judges. Br. Op. at 11 n.7. In lieu of response, it mischaracterizes petitioner's claim as a demand for "special rights and privileges." Id.

Petitioner submits that this Court should grant review to determine the procedures by which cases involving federal judges are to be managed to assure that federal judges receive the same protections afforded other citizens if they are to be prosecuted while they remain in office. As did Judge Reinhardt, petitioner submits that review by this Court is the only step that can now afford "Judge Claiborne consideration of his case by a tribunal that had all the appearances of fairness." (S.A. 29). See also Riley, Did Burger violate in Claiborne Case, Nat'l. L.J., Feb. 17, 1986, at 3 (article reporting procedures employed in designating special panel); Change the System, id., at 12 (editorial urging adoption of

random selection procedure for special panels).

3. The government mischaracterizes the nature of the Brady issue and unfairly states the facts upon which it is presented. Br. Op. at 11-13, 3-6. In United States v. Bagley, 105 S.Ct. 3375 (1985), the Court prescribed a standard of review that the lower courts were to apply to determine where the prejudicial effect of improperly withheld exculpatory material required reversal. The government argues that the application of that standard involves a "factbound determination [that] does not warrant further review." The government's conclusory assertion ignores the conclusion articulated by Circuit Judge Ferguson and adopted by Circuit Judges Reinhardt and Pregerson below. United States v. Claiborne, A. 127-35 (Ferguson, C.J., dissenting from denial of rehearing en banc); id. at S.A. 1-33, 19 n.3 (Reinhardt, C.J., dissenting from denial of rehearing en banc);

id. S.A. 34 (Pregerson, C.J., dissenting from denial of rehearing en banc).

The government also unfairly states the evidence against Judge Claiborne in a manner calculated to suggest tacitly that disclosure of the interview reports withheld by the trial court should not undermine confidence in the jury's verdict. Br. Op. at 3-6.[3] The government acknowledges that Judge Claiborne initially advised his accountant that his income for 1979 from his practice was over $46,000 and that he paid his estimated tax liability on that basis. Br. Op. at 4. The government concedes that the figure set forth

3. The two grand juries whose deliberations were not infected by Conforte's testimony did not indict Judge Claiborne on the unrelated tax-evation counts. Only the grand jury that did receive the purchased testimony returned an indictment. The government's evidence on the unrelated tax counts was such that the first jury to hear it could not reach a verdict. The very length of the discussion by the special panel below makes clear that the questions raised by Judge Claiborne with respect to the sufficiency of the evidence were substantial A.1, 40-54. Petitioner has not presented those questions here.

in Judge Claiborne's letter to Wright dated April 11, 1980, was the correct figure. Id. at 5 n.2. The government does not disclose that Wright's "secretary" who could not recall receiving that letter was also Wright's wife and the person in his office who had kept Judge Claiborne's books. And the government does not acknowledge that Wright's testimony concerning the later notes (GX.31) in which the $22,322.97 figure appeared was conflicting.

As the government points out, Wright claimed at one point that he received the $22,322.97 figure from Judge Claiborne. Br. Op. at 5. The government does not point out, however, that Wright also testified that it was Wright who had given this figure to Judge Claiborne (Tr. 1201-02) and that Wright, when confronted with the conflict, disclaimed any present recollection (Tr. 1202-03). The government also fails to point out that Wright's latter version that was consistent

with Judge Claiborne's testimony. Judge Claiborne testified that the handwritten notes (GX.31) were made while he had no records before him during a telephone call in which Wright supplied all the figures (Tr. 873-77).

It is clear that Judge Claiborne's credibility was central to the jury's verdict--both tax counts required the government to prove his state of mind and intent at the times he signed each of the returns.[4] Central to that determination was the jury's determination whether Judge Claiborne and his

4. The special panel acknowledged that the jury's determination of Judge Claiborne's credibility was central on both counts. A. 44-54. The question on the 1979 return was whether Judge Claiborne had disclosed all the income from his former practice to his then accountant, Jay Wright. The question on the 1980 return was whether a former trial lawyer and present federal judge who had consistently relied upon those who held themselves out as experts to keep his books and prepare his tax returns relied in good faith on his then accountant's determination that the residual proceeds received from his practice two years after he assumed the bench should be characterized as capital gains from the disposition of his practice rather than ordinary income.

secretary were being truthful when they testified that the April 11th letter had been written and delivered to Wright's secretary, Mrs. Wright. Wright's assertion that he had never lost or misplaced any of Judge Claiborne's records and that they did not have the letter directly conflicted with and undermined the Judge's testimony and his credibility.

The trial court failed to examine or disclose the FBI reports showing that Wright had told the FBI that he and his wife had "misplaced or inadvertently destroyed records" and had thrown away some of Judge Claiborne's records when Wright had moved in 1981. The prejudicial effect of those failures must be judged in the context of all the evidence that was before the jury, not just the evidence that the government would emphasize to avoid review here.

4. Two developments have occurred since the petition was filed that bear upon the

need for review here. First, the additional dissents filed by Circuit Judges Reinhardt (S.A. 1-33) and Pregerson (S.A. 34) emphasize the concerns raised in the petition and have generated concerns in the press. See, e.g., Riley, Did Burger violate law in Claiborne Case, supra, Change the System, supra. This Court should address those concerns.

Second, two additional petitions have been filed that ask this Court to give content to the constitutional protections necessary to maintain the independence of the courts and preserve the necessary separation of powers. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, Hastings v. Judicial Conference of the United States, No. 85-1301 (filed January 30, 1986), and Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Hastings v. Godbold, No. 85-1609 (filed March 28, 1986). All three petitions are related in

that each asks the Court to determine the content of the constitutional scheme adopted to establish and maintain the courts as a separate and independent branch of government. Petitioner submits that the Court should consider the need to resolve the first two questions presented here as part of the broader context posed by the questions presented by all three petitions.

Accordingly, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

Robert S. Catz
Cleveland Ohio

Oscar B. Goodman
Las Vegas, Nevada

Terence J. Anderson
Counsel of Record
c/o University of Miami
School of Law
Coral Gables, Florida
33124-8087
(305) 284-2971

attorneys for petitioner

No. 85-1197

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IN THE
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v.

UNITED STATES OF AMERICA
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. CATZ
Cleveland Marshall
College of Law
Cleveland, Ohio

OSCAR B. GOODMAN
Goodman, Terry,
Stein & Quintana
Las Vegas, Nevada

TERENCE J. ANDERSON
Counsel of record
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for
The Honorable Harry Eugene Claiborne,
Petitioner.

JANUARY 15, 1986

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UNITED STATES of America
Plaintiff-Appellee,

v.

Harry E. CLAIBORNE,
Defendant-Appellant.

No. 84-1294

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 26, 1985.
Decided July 8, 1985

Appeal from the United States District Court for the District of Nevada.

Before PELL, LUMBARD, and McWILLIAMS Senior Circuit Judges.*

PELL, Senior Circuit Judge

A jury sitting in Reno, Nevada, convicted Defendant Harry E. Claiborne on two counts charging that defendant will-

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*Wilbur F. Pell, Jr., Senior Circuit Judge for the Seventh Circuit. J. Edward Lumbard, Senior Circuit Judge for the Second Circuit, and Robert H. McWilliams, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

fully underreported his taxable income on his 1979 and 1980 tax returns. 26 U.S.C. § 7206(1)(1967). The jury acquitted defendant of one count charging that he submitted a false statement to the Judicial Ethics Committee. 18 U.S.C. § 1001 (1976). The district court sentenced defendant to a term of two years imprisonment plus a $5,000 fine on each tax count. Defendant appeals from the judgment of conviction on the two income tax counts.

I. THE FACTS

Defendant, who continues to hold office as a United States district judge, became a district judge for the District of Nevada on September 1, 1978. Prior to that time, defendant was engaged in a lucrative private practice in Las Vegas, Nevada, and had had an income of six figures annually. Upon entering the

judiciary, defendant's annual salary was $58,000. In a 1980 letter requesting payment of legal fees he had earned before becoming a judge, defendant stated that he was in desperate financial straits. Approximately two years later, a federal grand jury in Portland, Oregon, began investigating allegations that defendant had accepted bribes from a Joseph Conforte in the performance of his official duties. Two subsequent grand juries, one again in Portland, Oregon, and one in Reno, Nevada, investigated these charges as well as allegations that defendant had understated his income in his 1979 and 1980 tax returns and had filed a false financial statement with the Judicial Ethics Committee. The term of the first Portland grand jury expired and the second grand jury there was not asked to return an indictment. The Reno grand jury, however,

returned a seven count indictment against defendant, containing four charges relating to defendant's alleged bribery activities with Joseph Conforte, the two tax counts, and one count charging that defendant falsely reported his finances to the Judicial Ethics Committee.

Joseph Conforte appeared as a witness before the indicting grand jury. In exchange for Conforte's testimony, and his agreement to cooperate fully in further investigations of defendant and in his prosecution, the Government agreed to recommend a substantial reduction in sentences that Conforte had previously received for tax evasion. Subsequently, a federal judge ordered reduction of Conforte's sentences.

Defendant moved to dismiss the indictment returned against him on various grounds, all of which the district court

rejected. The case then proceeded to trial. The district court ultimately declared a mistrial after the jury reported that it was hopelessly deadlocked.

At this point, the Government voluntarily moved to dismiss the four Conforte bribery counts, stating in part: "The attorneys further believe that in the first trial of this case the presentation of evidence on Counts One, Two, Three and Four may have distracted the jury in its consideration of Counts Five, Six, and Seven and contributed to its inability to reach a verdict on those counts." Record at 204. Defendant then renewed all previous pretrial motions relating to the remaining three counts, all of which the district court denied, in some instances after a hearing. The case subsequently proceeded to trial for a second time, on the two tax counts and the count relating

to the Judicial Ehtics Committee. As we have noted, the jury convicted defendant on the two tax counts, but acquitted him on the count relating to the Ethics Committee.[1]

Defendant challenges his conviction on a number of grounds, which we shall discuss in turn.

II. DEFENDANT'S CONTENTIONS

A. Judicial Immunity from Prosecution

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1. The defendant points out in his brief that the jury acquitted him on Count VII. The Judicial Ethics Committee count, but convicted him on the two tax counts, which likewise involved the reporting of income. The defendant does not directly challenge these verdicts as being inconsistent. To the extent he indirectly does so, we do not regard them as inconsistent. Count VII related to a requirement that federal judges disclose certain information about their property and income in an annual report. The jury may well have regarded violation of this requirement as an entirely different crime from filing false information in an income tax return, because the latter involves a failure to pay money due the Government and acutely concerns the public interest.

Defendant's first contention deserves minimal attention from this court. Defendant contends that Articles I and III of the United States Constitution, as well as the doctrine of separation of powers, prohibit the prosecution of a federal judge without prior impeachment by Congress. The parties concede that no impeachment proceedings have been brought against defendant. Defendant filed a pretrial motion covering these contentions, which the district court denied. This Court upheld the district court's denial of defendant's motion. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984), cert. denied, U.S. , 105 S.Ct. 113, 83 L.Ed.2d 56.

In upholding the denial of defendant's motion, this court relied on two cases which dismissed similar claims. United States v. Claiborne, 727 F.2d at

845, citing United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974)(per curiam), cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. These cases squarely held that the Constitution does not immunize a federal judge from criminal prosecution prior to impeachment. United States v. Hastings, 681 F.2d at 710-11; United States v. Isaacs, 493 F.2d at 1144. In view of the reasoning in Hastings and Isaacs, and in view of our previous opinion, in this case, squarely deciding this issue adversely to defendant, we see no reason to re-examine the question here.

We remark, in addition, that defendant's suggestion that the protections guaranteed by the Constitution to criminal

defendants are inadequate to protect a federal district judge appears disingenuous from our review of the record, which appears to us to reflect that defendant was afforded a fair trial fully consistent with the protection of his constitutional rights.

B. Intrusions into the Grand Jury's Independence

Defendant's second contention, in which he seeks dismissal of his indictment, subsumes numerous challenges relating to the manner in which the prosecution obtained the indictment. These challenges, unlike defendant's first contention, merit some discussion from this court.

1. The Conforte testimony and its effect on the grand jury

Defendant contends that the prosecution knowingly presented the perjurious testimony of Joseph Conforte to the

indicting grand jury, and that this testimony unconstitutionally biased the grand jury against him. Defendant maintains that the prosecution intentionally failed, in examining Conforte, to require Conforte to specify the exact dates on which incidents culminating in the alleged acts of bribery occurred, because the prosecution allegedly knew that the acts did not take place. Defendant additionally maintains that the prosecution amended its request for notice of defendant's intent to rely on an alibi defense three times before trial, each time changing the dates on which the alleged acts of bribery took place, because Conforte kept changing the details of his story. These acts, defendant asserts, amounted to the knowing presentation of perjured testimony, or at least an invitation to Conforte to perjure himself before

the grand jury. Defendant asserts that Conforte's perjurious testimony irreparably biased the grand jury against him, in violation of the Due Process Clause of the Fifth Amendment. Alternatively, defendant asserts that the prosecution's behavior in obtaining and presenting the Conforte testimony justifies a dismissal of defendant's indictment in the exercise of this court's supervisory power.

We begin our analysis by examining the Fifth Amendment's grand jury guarantee in federal felony trials. That guarantee ensures that, except in certain military cases, "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury." U.S. CONST. amend. V. Federal courts agree that the framers of the Bill of Rights included the grand jury guarantee in the Fifth Amendment

to protect wrongfully accused defendants against mistaken and vindictive prosecutions. See United States v. Dionisio, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (1980). Federal courts also agree, however, that the grand jury serves important investigative functions in addition to serving as a shield against unwarranted prosecution. United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). As the Supreme Court observed in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)(citations omitted):

> It is a grand inquest, a body of powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular indivi-

> dual will be found properly subject to an accusation of crime. . . .

Id. at 688, 92 S.Ct. at 2660.

> When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the procedures will result in an indictment can be made.

Id. at 701-02, 92 S.Ct. at 2667 (citations omitted).

In view of the grand jury's broad investigatory powers, and in view of the grand jury's duty not to determine guilt or innocence but to determine whether

probable cause exists to believe that a crime has been committed, United States v. Calandra, 414 U.S. at 349, 94 S.Ct. at 620, the courts have sharply limited a defendant's ability to challenge the nature of evidence presented to a grand jury. See Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that the questions were based on evidence derived from an unlawful search and seizure); Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)(barring a challenge based on the exclusive use of hearsay before a grand jury); Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (prohibiting a challenge to subpoenaed evidence based on defendant's privilege against self-incrimination). In so doing, the courts

have recognized that such evidentiary challenges are best resolved in the adversary arena of a criminal trial United States v. Short, 671 F.2d 178, 183 (6th Cir. 1982), cert. denied, 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332. In order to ensure that trials and not pretrial inquiries into the grand jury process resolve such challenges, the courts have attached a presumption of regularity to grand jury proceedings. See United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977); Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972).

Notwithstanding these limitations on a defendant's ability to challenge the evidence presented to a grand jury, the cases do recognize that defendants may overcome the presumption of regularity

which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on a proper showing of grand jury abuse. United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979). Defendants may establish such grand jury abuse by demonstrating that the prosecutor obtained an indictment by knowingly submitting perjured testimony to the grand jury. United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978), United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 4335 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). The courts reason that such conduct is arbitrary and capricious and therefore violates due process or that such conduct must be condemned in the exercise of the courts' supervisory powers. United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir. 1983), cert.

denied, 461 U.S. 932, 103 S.Ct. 2097, 77 L.Ed.2d 305. Indeed, a decision of this court requires a prosecutor who discovers perjury by a grand jury witness after indictment to inform the defendant, the trial court, and the grand jury of the perjury so that the grand jury may reconsider its decision to indict. United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974).

The cases agree, however, that perjury before a grand jury must be material to justify dismissal of the indictment. United States v. Bracy, 566 F.2d 649, 655 (9th Cir. 1977), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978); United States v. Bowers, 534 F.2d 186, 193 (9th Cir. 1976) (per curiam), cert. denied, 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 311; Coppedge v. United States, 311 F.2d 128,

132 (D.C. Cir. 1962). Moreover, courts should not presume that perjured testimony was material. United States v. Kaplan, 554 F.2d 958 (9th Cir. 1977) (per curiam), cert. denied, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315. As a consequence, if sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due to the presence of perjured testimony before the grand jury, on the assumption that the grand jury would have returned an indictment without the perjurious evidence. Coppedge v. United States, 311 F.2d at 131-32. In a similar vein, other courts confronted with evidence of perjured testimony before a grand jury presume that no prejudice thereby resulted to defendant and therefore refuse to dismiss the grand jury's indictment. United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984).

In the case before us, defendant contends that the perjurious testimony of Joseph Conforte before the grand jury did result in actual prejudice because the grand jury would not have returned an indictment without it. There is no evidence to support these assertions. The defenant has made no showing, beyond mere speculation, that Conforte gave perjured testimony before the grand jury or at the first trial. Nor has he made any showing that the Government had any reason to believe that Conforte's testimony was perjured.[2] Speculation cannot justify

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2. We note that defendant alsc raises objections to the manner in which the Government procured Conforte's testimony. Specifically, defendant contends that the Government's deal with Conforte, under which Conforte agreed to testify truthfully before all grand and petit juries and the Government agreed to recommend a reduction in Conforte's previously imposed sentence for tax fraud, among other offenses, was fundamentally unfair. We disagree, and observe that the agreement

this court's intervention into the grand jury's proceedings. See United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977) (discussing separation of powers reasons for court's refusal to intervene in grand jury proceedings), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83. Under these circumstances, the Government's presentation of Conforte's testimony to the grand jury was not the sort of

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did not make any or all benefits to Conforte contingent on defendant's indictment or conviction. See United States v. Dailey, 759 F.2d 192, 197 (1st Cir. 1985). Thus, the agreement did not present an invitation to perjury. Id. We note, in addition, that the district court correctly determined that defendant lacked standing to contest the reduction of Conforte's sentence. Finally, we note that defendant misinterprets this court's construction of the 120-day period set forth in Rule 35(b) of Federal Rules of Criminal Procedure. Contrary to defendant's assertion, this court allows reduction of sentence within a reasonable time following the expiration of 120 days. United States v. Smith, 650 F.2d 206 (9th Cir. 1981).

flagrant misconduct required to justify dismissal of the indictment under the Due Process Clause or our supervisory powers. United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391-92 (9th Cir. 1983), cert. denied, U.S. , 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

Moreover, even if Conforte perjured himself before the grand jury, we note that Conforte's testimony related only to Counts I through IV of the indictment, and that the Government moved to dismiss these "Conforte" counts before proceeding to trial (for the second time) against defendant. Thus, any perjury committed by Conforte before the grand jury was not material to defendant's indictment on Counts V and VII and necessarily was not material to defendant's conviction on Counts V and VI. See United States v. Bracy, 566 F.2d 649, 656 (9th Cir.1977)

(defining material perjury as evidence that creates a reasonable doubt with respect to defendant's guilt that did not otherwise exist), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978). See also Laughlin v. United States, 385 F.2d 287, 291 (D.C.Cir.1967) (examining taint solely with respect to the charges of which defendant was convicted), cert. denied, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968). Indeed, Conforte did not appear as a witness at defendant's second trial. Under these circumstances, this court perceives no prejudice resulting from the presentation of Conforte's testimony to the grand jury. In any event, there can be no claim, and there is no claim, that there was insufficient non-perjured evidence to justify the indictment of the defendant on the tax counts and the ethics

count. See Talamante v. Romero, 620 F.2d 784, 791 (10th Cir.1980) (finding it unlikely the grand jury would have declined to indict defendant in view of the petit jury's finding of guilt after a full trial), cert. denied, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99. As a result, we find that the trial judge committed no abuse of discretion in refusing to dismiss defendant's indictment due to presentation of perjury before the grand jury. United States v. Noti, 731 F.2d 610, 613 (9th Cir.1984).

2. Obtaining access to defendant's tax returns for use in a non-tax case.

Next, defendant challenges the manner in which the prosecution obtained access to defendant's tax returns. Defendant asserts that the prosecution obtained access to the returns in violation of 26 U.S.C. § 6103(a), because the prosecution sought the returns for use in a judicial

proceeding relating to tax administration while claiming to seek the returns for use in a non-tax case. Defendant asserts that the procedures required for disclosure in tax-related cases are more stringent than those required for disclosure in non-tax cases. Specifically, defendant contends that Internal Revenue Service guidelines require routine procedures including audits and conferences between Internal Revenue Service and Department of Justice officials before transfer of a case from the Internal Revenue Service to the Department of Justice. Defendant contends that these routine steps were not taken here and that, therefore, the prosecution should not have submitted the returns to the grand jury.

We disagree. First, although 26 U.S.C. § 6103(a) protects an individual's privacy interest in his or her tax returns

and tax return information, subsections (h) and (i) of that section permit disclosure of tax returns to federal officers and employees in both tax and non-tax cases. 26 U.S.C. § 6103(a), (i) (1985 Supp.); 26 U.S.C. § 6103(h) (1980). Contrary to defendant's assertions, these subsections prescribe more severe procedures for access to tax returns in non-tax cases than in tax cases. Id. See also United States v. Mangan, 575 F.2d 32, 38 (2d Cir.1978), cert. denied, 439 U.S. 931, 99 S.Ct. 320, 58 L.Ed.2d 324.

In this case, the district court granted disclosure of defendant's tax returns to the Department of Justice pursuant to 26 U.S.C. § 6103(i) for use in the prosecution's bribery case against defendant. 26 U.S.C. § 6103(i) (1985 Supp.). We find that this disclosure was proper. We note that the prosecution

could also have obtained access to the returns for use in its tax case against defendant, by virtue of section 6103(h). 26 U.S.C. § 6103(h) (1980).[3] As a result, even if the district court's disclosure of defendant's tax returns under section 6103(i) was improper, any error thereby resulting to defendant was harmless. Cf. Davidson v. Brady, 559 F.Supp. 456, 461 (W.D.Mich.1983). We additionally acknowledge, and concur with, the many cases holding that suppression of a defendant's tax return is an inappropriate remedy even in cases of plain error. Marvin v. United

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3. Although defendant claims that Internal Revenue Service guidelines specified several procedural steps to be taken prior to release of tax information in tax-related cases, defendant concedes that no case requires adherence to any such guidelines. We note that In re Gruberg, 453 F.Supp. 1225, (S.D.N.Y.1978) stands for a contrary proposition because the case acknowledges that a grand jury inquiry can go forward without a recommendation from the Internal Revenue Service to the Department of Justice.

States, 732 F.2d 669, 673 (8th Cir.1984); United States v. Barnes, 604 F.2d 121, 146 (2d Cir.1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

3. Investigation by three grand juries

Third, defendant contends that the prosecution's presentation of the same or similar evidence to three grand juries constituted an abuse of the grand jury process in violation of Petite v. United

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We note, in addition, that many cases refuse to dismiss indictments based on challenges involving a federal agency's failure to adhere to its own guidelines. United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir.1980); United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.1978) (per curiam); cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140. Finally, we note that defendant's challenge to the use of his tax returns in procuring his indictment resembles the type of evidentiary challenge to grand jury procedures foreclosed by the Supreme Court in United States v. Costello, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), and its progeny.

States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490(1960), because it bifurcated the prosecution's investigation of defendant's case. Successive grand juries impaneled in Portland, Oregon, investigated defendant's case but for the reasons stated above did not return an indictment against him. The third grand jury, impaneled in Reno, Nevada, returned the indictment involved in this appeal.

In United States v. Thompson, 251 U.S. 407, 413-14, 40 S.Ct. 289, 291-92, 64 L.Ed. 333 (1920), the Supreme Court accepted the Government's contention that a Grand jury's power is continuous and that adverse action or failure to act by a previous grand jury does not limit or exhaust a successor grand jury's power to investigate. Rule 6(e)(3)(C)(iii) of the Federal Rules of Criminal Procedure furthermore authorizes transfer of one

grand jury's material to another grand jury without court order. FED.R.CRIM.P. 6(e)(3)(C)(iii). The Rule thus contemplates that successive grand juries may investigate the same or similar crimes. Consequently, this court holds that the prosecution's presentation of evidence to three grand juries in this case violated no procedural rule or judicially-imposed limits on a grand jury's investigatory role.

The presentation of evidence to three grand juries additionally did not violate the Supreme Court's decision in Petite, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). In Petite, the Supreme Court granted the Government's motion to dismiss a federal indictment returned by a grand jury in violation of a Department of Justice policy forbidding successive state and federal prosecutions for the same

crime. Id. at 530, 80 S.Ct. at 451. In Petite, the Supreme Court did not forbid, or even criticize the investigation of one crime by successive grand juries. In this case, although three grand juries investigated defendant's course of conduct, only one grand jury returned an indictment against him. The Government's presentation of evidence to these grand juries thus violated neither the letter nor the spirit of Petite.

Moreover, even if the Government's presentation of evidence to three grand juries could be considered to have violated the Supreme Court's decision in Petite, a Petite violation does not compel dismissal of an indictment. United States v. Garner, 632 F.2d 758, 761 (9th Cir. 1980), cert.denied, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); United States v. Smith, 595 F.2d 1176,

1181 (9th Cir.1979); United States v. Snell, 592 F.2d 1083, 1087 (9th Cir.1979), cert. denied, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315. As a result, this court would not order dismissal of the indictment returned against defendant even if the facts of this case presented a violation of Petite.

4. Employment of grand jury agents

Finally, defendant contends that this court must order dismissal of the indictment because the prosecution employed the service of certain "grand jury agents" in investigating this case, and thereby overrode the independence of the grand jury. We note that the foreman of the two Portland grand juries administered an oath to one Internal Revenue Service agent and four Federal Bureau of Investigation agents, to the effect that the agents would report back to the grand jury the

findings of their investigations and return to the grand jury any documents of which the grand jury should be made aware. The grand jury agents served subpoenas duces tecum upon various persons, which informed those persons that they could deliver the subpoenaed documents either to the grand jury agents or to the grand jury itself. The grand jury agents additionally examined the subpoenaed documents and discussed among themselves the relevance of the subpoenaed documents to the investigation. One grand jury agent, shortly before his swearing-in, informed the recipient of such a subpoena that the grand jury would swear him in as its agent in the near future. This agent later testified at length before the indicting grand jury in Reno.

The various cases addressing the propriety of employment of grand jury

agents recognize that the Federal Rules of Criminal Procedure do not authorize such grand jury personnel. See United States v. Kilpatrick, 594 F.Supp. 1324, 1344 (D.Colo.1984). appeal docketed, No. 84-2481 (10th Cir. Oct. 24. 1984). These cases analyze the employment of grand jury agents as a problem of unauthorized disclosure of grand jury material or as a problem of unauthorized presence during grand jury deliberations. Id. at 1329-30; United States v. Carcaise, 442 F.Supp. 1209, 1210 (M.D.Fla.1978). Both problems present violations of Rule 6 of the Federal Rules of Criminal Procedure. FED.R.CRIM.P.6(d) (setting forth who may be present during grand jury deliberations); FED. R. CRIM. P. 6(e) (setting forth the circumstances under which, and to whom, disclosure of grand jury materials is proper). The cases acknowledge,

however, that the danger arising from the employment of grand jury agents derives from the risk that such agents will override the independence of the grand jury, whether the employment of such agents is classified as an unauthorized presence or as an unauthorized disclosure. As the court noted in United States v. Anderson, 577 F.Supp. 223 (D. Wyo. 1983), appeal docketed, No. 83-2519 (10th Cir. Nov. 17, 1983)(argued April 18, 1985):

> The most important function of a grand jury is to stand between prosecuting authorities and the suspect as an unbiased valuator of evidence. That function cannot be maintained or understood by society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury.... A grand jury that has become identified in the eyes of lay witnesses before it with law enforcement agents is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing

> its constitutional function to check the power of the government.

Id. at 232.

Only two cases, to our knowledge, have ordered dismissal of an indictment due to the employment of grand jury agents. United States v. Kilpatrick, 594 F.Supp. at 1353 (D. Colo. 1984)(appeal docketed as previously noted); United States v. Anderson, 577 F.Supp. at 234 (D. Wyo. 1983) (appeal docketed as previously noted). These cases, decided by the same district judge, involved conduct of a substantially more egregious nature than that alleged here. In Kilpatrick, for example, the prosecutor and not the foreman of the grand jury administered oaths to the agents. 594 F.Supp. at 1328. In addition, the agents appeared together as witnesses before the grand jury, outside the presence of Government coun-

sel. Id. at 1330. Moreover, the court believed that the agents had remained present during an important colloquy between the prosecutor and the grand jurors. Id. Finally, the court suggested that the grand jury agents in fact were using their access to grand jury materials to further civil enforcement purposes of the Internal Revenue Service. Id. at 1331. In Anderson, the grand jury agents informed recipients of grand jury subpoenas that they were agents of the grand jury. 577 F.Supp. at 232. In addition, one grand jury agent informally granted immunity to a grand jury witness. Id.

In this case, only one grand jury agent revealed his (future) status as a grand jury agent to one recipient of a grand jury subpoena. No grand jury agent sought to immunize the testimony of grand jury witnesses from future prosecution.

Moreover, the trial court gave no indication that it thought the grand jury agents were misusing their access to grand jury materials for civil enforcement purposes. Under these circumstances, this court finds the use of grand jury agents in this case similar to the use of postal employees in United States v. Carcaise, 442 F.Supp. at 1212, which was to gather and summarize grand jury evidence. Like the court in Carcaise, id., this court holds that the employment of grand jury agents does not justify dismissal of the indictment.

We note, in addition, that Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) authorizes disclosure of grand jury materials to federal officials such as the Federal Bureau of Investigation and Internal Revenue Service agents who assisted the prosecution in collecting

evidence for the grand jury in this case. FED.R.CRIM.P. 6(e)(3)(A)(ii). See also In re Gruberg, 453 F.Supp. 1225, 1233-34 (S.D.N.Y.1978). We furthermore observe that the prosecution disclose the names of these agents to the district court. See Fed.R.Crim.P. 6(e)(3)(B). Because the district court, after a hearing, did not believe that these agents sought access to the grand jury's materials for purely civil purposes, and because the record itself suggests no such intention, disclosure to the agents was proper under Rule 6(e)(3)(A)(ii) and did not require a court order pursuant to Rule 6(e)(3)(C). See generally United States v. Sells Engineering, Inc., 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). We note that the legislative history to Rule 6(e)(3)(C)(iii) suggests an assumption on the part of Congress that FBI and IRS

agents would perform investigatory functions preceding grand jury indictments. S.REP. NO. 95-354, 95th Cong., 1st Sess. 6, reprinted in 1977 U.S.CODE CONG. & AD.NEWS 527, 530. As a result, the five FBI and IRS agents in this case properly gained access to the grand jury's material.

We find no indication in the record that any one of the five grand jury agents remained presend during the grand jury's consideration of unrelated evidence or during colloquies between the prosecutor and the grand jury. Thus the record suggests no unauthorized presence violation of Rule 6(d). FED.R.CRIM.P. 6(d). The one grand jury agent who appeared as a grand jury witness properly was present before the grand jury under the terms of the Rule.

Under the circumstances of this case, we find that the employment of grand jury

agents did not override the independence of the grand jury. We observe, however, that the assistance of such federal employees, though essential to the progress of many complex or controversial investigations, may raise the possibility of claims of error unnecessarily.

C. Sufficiency of the Evidence

Defendant's third contention challenges the sufficiency of the Government's evidence to support the jury's guilty verdicts on Counts V and VI. Counts V and VI charged that defendant willfully subscribed, under penalties of perjury, his 1979 and 1980 tax returns even though defendant did not believe the returns to be true and correct in material matters. 26 U.S.C. § 7206(1) (1967). Specifically, Counts V and VI charged that defendant grossly underreported, in his 1979 and 1980 tax returns, the amount of legal fees

he received from his prior law firm for work he had performed before becoming a judge. The Government contends that defendant received approximately $41,000 in fee income tax in the 1979 tax year although defendant's 1979 tax return reported that he had only received approximately $22,000 in fee income that year. The Government furthermore contends that defendant received approximately $88,000 in fee income during the 1980 tax year although defendant's 1980 return reported no fee income. Defendant maintains that the fee income which he received during the 1980 tax year was included in a $150,000 figure representing the sale price of defendant's interest in his prior law firm. The 1980 return reported the $150,000 sale price price in a Schedule D in which defendant claimed a $100,000 capital loss on the sale of his interest

in the firm. Defendant later conceded that the 1980 return inappropriately characterized his fee income during that year as a capital gain.

The Government proffered substantial evidence to support its claim that defendant had willfully underreported his fee income in the 1979 and 1980 returns. The Government submitted, for example, duplicates of checks sent to defendant from attorneys working for his prior law firm, representing the fee income that defendant had earned before becoming a judge. The Government also submitted various bank records setting forth amounts that defendant deposited in his personal account after he received the fee income checks. Both parties agree that defendant did not deposit all of the checks but, rather, cashed several of the checks at neighborhood casinos. The Government's evidence

suggested that defendant reported on his 1979 and 1980 tax returns all checks which he deposited, but failed to report any of the checks which he cashed at casinos.

The Government furthermore offered in evidence correspondence between defendant and Joseph Wright, the accountant who prepared defendant's 1979 tax return. This correspondence demonstrated that defendant supplied Wright with an estimate of his 1979 fee income which understated defendant's actual fee income by approximately $19,000. Other documentary evidence submitted by the Government demonstrated that Wright relied on this estimate in preparing defendant's financial status to a lender from whom defendant was seeking a mortgage.

With respect to defendant's 1980 return, the Government offered as evidence defendant's sudden firing of Wright after

thirty years of service and hiring of Jerry Watson, head of Creative Tax Planning. Watson prepared defendant's 1980 return, for which defendant paid Watson $2,000 as compared to the $600 fee he had paid Wright. The Government also submitted defendant's request for an extension of time to file his 1980 return, which defendant prepared himself, in which defendant estimated his tax liability would exceed $42,000. The 1980 return, however, claimed a refund in excess of $44,000. Watson completed the 1980 return in pencil, and left erratic marks in the margin of the return and elsewhere. Defendant's counsel conceded at oral argument that the return cried out for an audit.

Defendant did not seek to rebut all of the evidence offered by the government to prove that defendant willfully under-

stated his 1979 and 1980 taxable income. Rather, defendant, while testifying at trial, consistently asserted that the understatements were not willfull because he relied in good faith on the expertise of Wright and Watson when he signed his 1979 and 1980 returns. Defendant maintains that he made full disclosure to Wright and to Watson of all income he received during these years, and that he justifiably relied on their tax advice when he signed the returns which they had prepared for him. A major dispute between the parties at trial centered around a letter allegedly delivered personally by defendant's secretary to Wright in which defendant claims to have disclosed accurately his 1979 fee income. Defendant's secretary, Judy Ahlstrom, testified that she delivered the letter to Wright's office. Wright testified at trial that he

did not receive the letter and that he never lost documents from his clients.

With respect to his 1980 return, defendant contends that his sudden hiring of Jerry Watson does not indicate an intent to understate his fee income, but simply a lawful desire to change accountants. Defendant asserts that the fee paid to Watson was not unreasonably high, but rather that the fee charged by Wright was unreasonably low. Defendant maintains that he innocently relied on Watson's ability to prepare correctly his 1980 return, and, because defendant was generally ignorant of th niceties of the tax law, he had no reason to doubt its accuracy. All of this, defendant contends, proves a lack of willfullness on his part in subscribing his name to the 1980 return.

There is no claim, however, that

Judge Hoffman erred in charging the jury. Therefore we have only to decide whether the Government presented enough evidence from which a jury, rationally could have concluded that Claiborne willfully filed false income tax returns. We regard the Government's evidence as ample.

Proof of willfulness is essential to support a conviction under section 7206 (1). United States v. Bishop, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973); United States v. Pallan, 571 F.2d 497, 501 (9th Cir. 1978). To prove willfulness, the Government must show that defendant intended to violate the law or knew that his actions would do so. United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976) (per curiam). The cases make clear that neither a careless disregard whether one's actions violate the law nor gross

negligence in signing a tax return will suffice. United States v. Loney, 719 F.2d 1435, 1436 (9th Cir.1983). The Government, however, may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. Black v. United States, 309 F.2d 331, 342 (8th Cir.1962) (inferring willfulness from any conduct the likely effect of which is to mislead or conceal).

In addition, a defendant may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information. Bursten v. United States, 395 F.2d 976, 981 (5th Cir.1968), cert. denied, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972). As the Seventh Circuit recently observed in United States v. Whyte, 699 F.2d 375

(7th Cir.1983):

> It is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant qualified to prepare federal tax returns, and . . . the defendant adopts and files the return as prepared without having reason to believe it is incorrect.

Id. at 379.

On the other hand, a defendant cannot shift his responsibility for deficiencies to an accountant if the defendant has withheld vital information or has taken steps to mislead his accountant. United States v. Garavaglia, 566 F.2d 1056, 1060 (6th Cir. 1977); Bender v. Commissioner, 256 F.2d 771, 774 (7th Cir. 1958).

In the case of Claiborne's 1979 tax return, the parties hotly disputed whether defendant made full disclosure of his 1979 fee income to Joseph Wright. As we have

noted, defendant claims that he made full disclosure in a letter delivered by his secretary to Wright's office. Wright, on the other hand, testified that he received no such letter. The resolution of that factual dispute was of course for the jury and we see no basis to question its determination to credit Wright's testimony over that of Claiborne and his secretary. Because we must draw all reasonable inferences from the evidence in favor of the Government, we cannot find that the jury incorrectly disregarded defendant's reliance defense. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 57 L.Ed.2d 1 (1979); United States v. Beecroft, 608 F.2d 753, 756 (9th Cir.1979); Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir.1982). We observe, in addition, that the jury, in viewing the Government's evidence that defendant incorrectly stated

his 1979 fee income in a different letter to Wright and the Government's evidence that defendant failed to report any checks cashed at casinos, may have decided that defendant deliberately sought to mislead Wright and therefore was not entitled to invoke the reliance defense. United States v. Scher, 476 F.2d 319, 321 (7th Cir.1973). We observe that the amounts of the checks defendant cashed at casinos were large (in one instance as large as $3,000), appearing to be more than mere pocket money. We therefore determine, after reviewing evidence, that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789; Burks v. United States, 437 U.S.1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978).

We base our conclusion with respect

to the 1980 return on similar grounds. Here, the crucial issue before the jury was not whether defendant made full disclosure to Jerry Watson, but rather whether he relied in good faith on Watson's advice. Defendant's own understanding of tax issues is highly relevant to the question of his good faith reliance on Jerry Watson. See United States v. Whyte, 699 F.2d at 380. The parties agree that defendant presided as district court judge over some tax law disputes. Nevertheless, defendant consistently has maintained that he is not a tax expert and has had no significant experience with the distinction between ordinary income and capital gain.

The jury obviously did not believe defendant and found his claims of ignorance to be disingenuous. The support for that conclusion is strong. We assume that

defendant gained some familarity with concepts as basic to the tax law as the distinction between ordinary income and capital gain during his law school studies, his thirty odd years of practicing law, and his three years on the bench before filing the 1980 return. Compare Lurding v. United States, 179 F.2d 419, 420 (6th Cir.1950) (where defendant was uneducated and unfamiliar with taxes, bookkeeping and accounting). We note that defendant reported his fee income as ordinary income in all years previous to 1980, when he reported the income as a capital gain. We observe, in addition, that defendant reviewed the 1980 return for ten or fifteen minutes before signing his name to it. During this time, defendant must have seen, at the least, that Watson had completed the return erratically, and in pencil. Defendant most likely

also observed at this time that Watson's return reported no fee income.

In reviewing the jury's decision to convict, we must draw all reasonable inferences from the evidence in favor the the Government. United States v. Spetz, 721 F.2d 1457, 1477 (9th Cir.1983). On this record, we have no trouble concluding that a rational trier of fact could have found defendant guilty of Count V and Count VI beyond a reasonable doubt. See United States v. Des Jardins, 747 F.2d 499, 507 (9th Cir.1984).

D. Trial Errors

Defendant's final contentions on appeal relate to various alleged errors made by the district court prior to and during defendant's second trial. Four of these alleged errors merit discussion.

1. Failure to excuse for cause two prospective jurors

First, defendant asserts that the

district court's refusal to excuse for cause two prospective members of the jury unconstitutionally forced him to exercise two of his allotted peremptory challenges, all of which he eventually exhausted, thereby forfeiting his right to exercise those challenges against two other veniremen and impairing his Sixth Amendment right to an impartial jury. See United States v. Martin, 749 F.2d 1514, 1518 (11th Cir.1985). Defendant contends that these two prospective jurors exhibited actual bias towards him and thus the district court should have granted his motions to excuse them from jury service for cause. Defendant also claims that the district judge asked these two prospective jurors leading questions, which did not elicit objectively whether the jurors could decide the case without bias or prejudice. We disagree with this charac-

terization of the judge's colloquies with the jurors and find that the judge fairly gave them the opportunity to reveal, without embarrassment, any bias or prejudice which they felt against defendant.

Defendant does not contend, however, that the jury which convicted him was biased. Rather, his objection to the district court's failure to exclude the two prospective jurors rests on the theory that it is constitutionally impermissible to force defendants to exhaust their peremptory challenges on persons who should be excused for cause. See United States v. Daly, 716 F.2d 1499, 1507 (9th Cir.1983), cert. dismissed, U.S. , 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977). We agree, and reaffirm that the peremptory challenge is an important safeguard of a defendant's Sixth

Amendment right to an impartial trial. See Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir.1981); United States v. Giacalone, 588 F.2d 1158, 1164 (6th Cir. 1978), cert. denied, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). See also Rosales-Lopez v. United States, 451 U.S. 182, 188 n. 6, 101 S.Ct. 1629, 1634 n. 6, 68 L.Ed.2d 22 (1981); Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

Even though this court agrees that forcing a defendant to expend peremptory strikes may implicate the Sixth Amendment. Celestine v. Blackburn, 750 F.2d 353, 360 (5th Cir.1984), a constitutional problem only arises in cases where a prospective juror upon whom defendant spent a peremptory challenge was actually biased and therefore should have been excluded by the trial judge. United States v. Allsup, 566

F.2d at 71. That is not the case here. One prospective juror, Robert Whitten, indicated during voir dire that he had a preconception of defendant's guilt or innocence and that defendant would have to come forward with evidence to overcome this preconception. The trial judge then instructed Whitten that a criminal defendant enjoyed a constitutional presumption of innocence and made clear to Whitten that defendant did not have to come forward with proof of innocence but rather the prosecution had to come forward with proof of defendant's guilt beyond a reasonable doubt. Whitten subsequently indicated that he would decide defendant's guilt or innocence impartially, on the evidence presented at trial and according to the law charged by the court.

A second prospective juror, Susan Varnum, indicated during voir dire that

she did not like defendant's appearance and admitted that she had formed an opinion on defendant's guilt or innocence as a result of the media coverage of defendant's case. Varnum also indicated, however, that she did not believe in trying cases through the newspapers and that defendant would not have a burden to overcome due to her personal attitude towards his appearance. Varnum furthermore expressed to the trial court that she was willing and able to judge the evidence in the case in an impartial manner.

Under these circumstances, we cannot find that the district court committed a manifest error or an abuse of its broad discretion in failing to excuse for cause jurors Whitten and Varnum. Celestine v. Blackburn, 750 F.2d at 360, United States v. Giacalone, 588 F.2d at 1164. Few aspects of a jury trial are

more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. United States v. Gullion, 575 F.2d,26, 29 (1st Cir.1978). Moreover, trial courts possess a peculiar ability to determine whether a prospective jurors claimed ability to decide a case impartially is genuine. Patton v. Yount, U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). A prospective juror's statement that he has some impression about the case or a party is a frank and honest answer to the court's inquiry, and the juror's statement that he can lay aside his impressions and decide the case on the evidence presented and the charge of the court should also be weighed in the discretion of the trial judge.

Here, the district court determined, based on the prospective jurors' respon-

ses, that Whitten and Varnum would weigh the evidence in the case impartially despite their initial preconceptions of defendant's guilt or innocence. We do not find this decision an abuse of the district court's discretion. Indeed, the fact that defendant took advantage of his peremptory challenges to strike Whitten and Varnum may reflect "not a denial of justice," but a proper utilization of the peremptory tool. United States v. Giacalone, 588 F.2d at 1164.

2. Failure to order disclosure of Jencks Act Statements

Second, defendant contends that the district court committed reversible error because the court erroneously declined to provide the defense, pursuant to the terms of the Jencks Act, 18 U.S.C. § 3500 (1985), certain "302" summaries of FBI interviews with a key Government witness,

concluding that the summaries did not contain material subject to disclosure under the Act. Specifically, defendant maintains that the district court improperly refused to disclose statements made by Joseph Wright to FBI agents during interviews with Wright prior to trial. Defendant contends that these statements would have impeached Wright's trial testimony and because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements would have impeached Wright's trial testimony and because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements prejudicially affected defendant's substantial rights.

One such statement suggested that Wright had misplaced or destroyed pre-1976

records during his move to a new office. Wright testified that he did not lose or misplace any records pertaining to defendant. Defendant maintains that Wright's loss of pre-1976 records may have suggested to the jury the possibility that Wright mistakenly included a letter written by defendant to Wright in 1980 in the records that Wright lost or destroyed before he moved to new quarters. Other statements included a reference by Wright to a Mr. Swanson, who helped Wright in his accounting business, a statement by Wright that he did not "cross-examine" his clients, and a statement by Wright that his work for defendant decreased when defendant became a judge. The trial court refused to order disclosure of this material on the ground that the summaries containing this material were not in fact "statements" by witness Wright.

In reviewing the district court's refusal to disclose the 302 forms to defendant, this court must ponder two questions. First, we must consider whether the 302 forms included "statements" of witness Wright within the meaning of the Jencks Act. Second, we must consider whether, assuming the 302 forms did contain such statements, the district court's refusal to order their disclosure prejudicially affected defendant's substantial rights. United States v. Long, 715 F.2d 1364, 1368 (9th Cir. 1983).

The Jencks Act restrictively defines those "statements" by a witness which are subject to disclosure. Specifically, the Act provides:

> The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the

United States, means--

(1) a written statment made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e) (1985). The 302 summaries of interviews conducted by Government agents with witness Wright cannot fall within subsection (1) of 18 U.S.C. § 3500(e) because Wright did not

draft the summaries or otherwise approve their contents. Compare Goldberg v. United States, 425 U.S. 94, 103, 96 S.Ct. 1338, 1344, 47 L.Ed.2d 603 (1976). Indeed, the record is bereft of evidence to suggest that Wright saw the 302 forms at all. Similarly, the 302 summaries cannot fall within subsection (3) of 18 U.S.C. § 3500(e) because Wright did not make any "statements" contained therein to a grand jury. 18 U.S.C. § 3500(e) (1985).

Furthermore, this court finds that the 302 summaries do not fall within subsection (2) of 18 U.S.C. § 3500(e) because the summaries do not purport to transcribe in a substantially verbatim fashion Wright's various interviews with Government agents. Rather, the summaries represent, in our view, the agent's selection of certain information conveyed by Wright for possible use in the Govern-

ment's case against defendant. See Palermo v. United States, 360 U.S. 343, 355 n. 12, 79 S.Ct. 1217, 1226 n. 12, 3 L.Ed.2d 1287 (1959) (characterizing an agent's 600 word summary of a 3 1/2 hour conference with a Government witness as the agents selection of items deemed appropriate for inclusion rather than a virtually verbatim narrative of what the witness said). Accord United States v. Bernard, 625 F.2d 854, 859 (9th Cir. 1980); United States v. Edwards, 702 F.2d 529, 531 (5th Cir. 1983); United States v. Durham, 587 F.2d 799, 802 (5th Cir.1979). The summaries additionally fail to satisfy the requirements of 18 U.S.C. § 3500(e)(2) because the agent did not draft them contemporaneously with Wright's responses during the interviews 18 U.S.C. § 3500(e)(2) (1985). We believe that the district court properly characterized the summaries

as non-Jencks Act material and, therefore, correctly declined to disclose their contents to defendant. Under these circumstances, we cannot find, as we must to overturn a district court's Jencks Act decision, that the district court's characterization was clearly erroneous, United States v. Hodges, 556 F.2d 366, 368 (5th Cir.1977), cert. denied, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978), or an abuse of discretion, Government of Virgin Islands v. Lovell, 410 F.2d 307, 310 (3d Cir.1969), cert. denied, 396 U.S. 964, 90 S.Ct. 440, 24 L.Ed.2d 428.

Moreover, even if the district court's refusal to disclose the summaries to defendant was clearly erroneous or an abuse of discretion, we do not believe that the district court's decision prejudicially affected defendant's substantial rights. United States v. Johnson, 521

F.2d 1318, 1320 (9th Cir.1975). The only information contained in the summaries that could be damaging to Wright's credibility, and therefore helpful to the defense, is Wright's admission that he lost or mislaid some records during his move to a new office.[4] The record demonstrates, however, that defendant did cross-examine Wright with respect to this loss of records at defendant's first trial. Thus, defendant had knowledge of the loss and made use of that knowledge without access to the summaries. Under these circumstances, the court's refusal

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4. Ordinarily, the Jencks Act discourages courts from speculating on what use defendants would make of witness statements. United States v. Bibbero, 749 F.2d 581, 585 (9th Cir.1984). In the case before us, however, defendant concedes that he would have used the information relating to Wright's loss of pre-1976 records to impeach Wright's testimony that he never lost records pertaining to defendant.

to disclose the summaries to defendant did not prejudice defendant's substantial rights. Government of Virgin Islands v. Lovell, 410 F.2d at 311. See also United States v. Johnson, 521 F.2d at 1320.

3. The prosecution's failure to disclose Brady material

Third, defendant contends that the prosecution's failure, following defendant's request to deliver these 302 summaries of interviews between Government agents and Wright deprived defendant of a fair trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Prior to trial, defendant requested from the Government any statements in its possession which would tend to impeach the credibility of any Government witness, including but not limited to statements contradicting other statements by such persons. Defendant asserts that the 302 summaries contained such impeachment

evidence, because the summaries suggested, among other things, that Wright may have misplaced important correspondence that he had received from defendant. Wright testified at trial that he never lost records pertaining to defendant. Defendant contends that the prosecution's failure to disclose this material might have affected the jury's verdict and consequently demands a new trial.

The Supreme Court's decision in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the framework for our analysis of the prosecution's failure to disclose this impeachment evidence. In Agurs, the Supreme Court reaffirmed its holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that due process requires a prosecutor to disclose material exculpatory information in its

possession to defense. Id. at 105-06, 96 S.Ct. at 2398-99. The Supreme Court announced different "materiality" tests, however, according to the specificity of a defendant's request for information. Id. at 106, 112, 96 S.Ct. at 2398-2401. If a defendant made a specific request for exculpatory information, which gave the prosecution notice of exactly what the defendant desired, undisclosed exculpatory information would be material if it might have affected the outcome of defendant's trial. Id. at 106, 96 S.Ct. at 2398. On the other hand, if a defendant made either a general request for exculpatory information or made no request, the undisclosed exculpatory information would not be material unless it created a reasonable doubt that did not otherwise exist. Id. at 112, 96 S.Ct. at 2401.

Defendant's request for information

in the Government's possession which would tend to impeach the credibility of any Government witness was a general and not a specific request. See United States v. Shelton, 588 F.2d 1242, 1249 n. 10 (9th Cir.1978) (characterizing a request for everything tending to impeach the credibility of an identified witness as a general request) cert. denied, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979); Ostrer v. United States, 577 F.2d 782, 786 (2d Cir.1978) (characterizing a request for material useful to cross-examine an identified witness with respect to bias as a general request) cert. denied, 439 U.S. 1115, 99 S.Ct. 1018, 59 L.Ed.2d 73 (1979); United States v. DiCarlo, 575 F.2d 952, 959 (1st Cir.1978) (characterizing a request for all evidence favorable to defendant, including impeachment evidence, as a general request) cert. denied, 439

U.S. 834, 99 S.Ct. 115, 58 L.Ed.2d 129. We note that defendant's request did not focus on a particular witness, United States v. Mackey, 571 F.2d 376, 389 (7th Cir.1978), or on particular sources of witness statements, such as 302 forms. Compare United States v. Warhop, 732 F.2d 775, 778 (10th Cir.1984). Under these circumstances, we find that defendant's request did not give the prosecution notice of exactly what information defendant desired. United States v. Agurs, 427 U.S. at 106, 96 S.Ct. at 2398.

Because defendant's request was general and not specific, the prosecution's failure to disclose the impeachment evidence contained in the 302 summaries will only justify a new trial if the evidence would have created a reasonable doubt that did not otherwise exist. United States v. Agurs, Id. 427 U.S. at

112, 96 S.Ct. at 2401. See also United States v. Lasky, 548 F.2d 835, 839 (9th Cir.1977) (per curiam) cert. denied, 434 U.S. 821, 98 S.Ct.63, 54 L.Ed.2d 77. Under the circumstances of this case, we find that disclosure of evidence would have created no such doubt. We acknowledge, of course, that credibility evidence can be material. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We acknowledge, in addition, that nondisclosure which impairs a defendant's ability effectively to cross-examine key witnesses may threaten to deprive a defendant of a fair trial. Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983), reversed on other grounds, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Nevertheless, we find that the prosecution's failure to disclose the 302

summaries in this case did not impair defendant's ability to cross-examine Wright effectively because defendant in fact had access to the most damaging impeachment evidence contained in the summaries and used this evidence to impeach Wright's credibility at the first trial. Cf. United States v. Peters, 732 F.2d 1004, 1009 (1st Cir.1984). Accordingly, the prosecution's disclosure of the impeachment evidence contained in the summaries would have told defendant nothing of importance that he did not know already. United States v. Truong Dinh Hung, 667 F.2d 1105, 1107 (4th Cir.1981) (per curiam), cert. denied, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982). Under these circumstances, we cannot find that the prosecutions's failure to turn over the 302 summaries to defendant deprived defendant of a fair trial. Cf.

United States v. Prior, 546 F.2d 1254, 1259 (5th Cir.1977).

Indeed, we would reach the same conclusion even if we construed defendant's request for impeachment evidence as a specific request, as one decision from this circuit advises us to do. United States v. Goldberg, 582 F.2d 483, 489 (9th Cir.1978), cert. denied, 440 U.S. 973, 99 S.Ct. 1538, 59 L.Ed.2d 790 (1979). Because the impeachment evidence was duplicative of information that defendant possessed prior to his second trial, we cannot find that the prosecution's failure to disclose the impeachment evidence was "material" to defendant's conviction under either standard enunciated in Agurs. United States v. Agurs, 427 U.S. at 106, 112, 96 S.Ct. at 2398, 2401. As a result, we hold that the district court correctly determined that any failure to disclose

which occurred in this case did not justify a new trial.

4. Improper sequestration of a defense witness

Finally, defendant contends that the district court committed an abuse of discretion by improperly sequestering defense witness Judy Ahlstorm during a brief recess in the middle of her testimony concerning her alleged delivery to Wright of a letter from Claiborne disclosing the full extent of his 1979 fee income. As we indicated previously, Ahlstrom was, and apparently still is, defendant's secretary of many years. Defendant asserts that the trial judge prevented defense counsel from calming Ahlstrom during this recess, even though Ahlstrom had become visibly upset during her previous testimony. Because Ahlstrom's testimony, and her credibility, were crucial to defendant's case, defen-

dant maintains that the trial court's refusal to allow defense counsel to calm her during this recess prejudicially affected the outcome of defendant's trial. We are not unmindful of the fact that this was the only instance of witness sequestration during defendant's trial. We are not persuaded, however, given the circumstances of this case, and Ahlstrom's obvious problems during her testimony, that her sequestration amounted to reversible error.

The record does not disclose why the trial judge ordered a recess, although it does reflect the court's determination that a recess at that particular time was an urgent necessity. This court will not engage in speculation as to the trial court's motives. Rather, we note the broad discretion enjoyed by a trial judge with respect to the mode of interrogating witnesses and presenting evidence, FED.R.

EVID. 611(a), and emphasize that this discretion includes the ability to order a recess as circumstances necessitate. This broad discretion over the mechanics of a trial furthermore includes the ability to order sequestration of a witness. See Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). In Geders, The Supreme Court observed:

> Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. The judge is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and of determining question of law. A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must

> meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process . . . . The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony.

Id. at 86-87, 96 S.Ct. at 1334-1335. The Court held, however, that this broad power to sequester a witness did not include the power to impair a defendant's right to the effective assistance of counsel by ordering a defendant not to discuss his trial with his attorney during a significant recess. Id. at 91, 96, S.Ct. at 1336. Accord United States v. Romano, 736 F.2d 1432, 1435 (11th Cir.1984). We note that the trial court's sequestration of witness

Ahlstrom did not impinge upon defendant's Sixth Amendment right to the effective assistance of his counsel in this case. Thus, defendant's reliance upon cases precluding sequestration of defendants on Sixth Amendment grounds is misplaced.

Our research reveals only one case in which a court has held that sequestration of a non-party witness may constitute reversible error under Geders. United States v. Romano, 736 F.2d, at 1439. In that case, the Eleventh Circuit reversed a defendant's conviction because the trial court had prevented his co-defendant, whose testimony was crucial to the first defendant's case, from communicating with his attorney with respect to his own testimony during a recess which lasted several days. Id. The court limited its holding to the peculiar facts of the case, however, and remarked that its holding "by

no means implie[d] that a co-defendant's conviction typically will be reversed on Geders grounds." Id.

We see no reason to extend the Eleventh Circuit's holding to the facts of this case. We note that the recess in this case was brief and that Ahlstrom resumed her testimony immediately after the recess ended. The trial judge apparently ordered Ahlstrom sequestered during the recess in order to prevent improper influences upon her testimony, a purpose endorsed by the Supreme Court in Geders. Geders v. United States, 425 U.S. at 87, 96 S.Ct. at 1334. Under the circumstances of this case, we find that the trial court's sequestration of Ahlstrom during a brief recess was a proper exercise of discretion.

III. CONCLUSION

This court holds, having considered

all of the claimed errors meriting attention:

(1) that Articles I and III of the Constitution did not render defendant immune from prosecution.

(2) that the Government did not engage in unconstitutional abuse of the grand jury process,

(3) That the evidence presented at trial was sufficient to sustain defendant's conviction, and

(4) that various alleged trial errors do not mandate a new trial.

We have considered other errors advanced by defendant, explicitly or implicitly, including a suggestion that he was the victim of selective prosecution; that the trial judge improperly refused to consider the effect of the trial's publicity in the Nevada newspapers

(some of which was unfavorable to the Government); the unusual extent to which the Government gave concessions to Conforte; the Government's treatment of an IRS agent who apparently did not favor an investigation of defendant; and grand jury investigations of other persons associated with defendant. Because we find on the record an insufficient basis to justify reversal of defendant's conviction on these and other grounds, this court accordingly AFFIRMS the judgment of conviction on Counts V and VI.

FILED
MAR 5 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 84-1009
v.	DC# CR-R-83-57-WEH Nevada (Reno)
HARRY EUGENE CLAIBORNE, Defendant-Appellant.	OPINION

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
WALTER E. HOFFMAN;
SENIOR DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED FEBRUARY 24, 1984

Before: GIBSON, GARTH, and KENNEDY, Circuit Judges.*

PER CURIAM:

This interlocutory appeal raises anew the issue whether the United States Constitution immunizes a sitting federal

*Sitting by designation: the Honorable Floyd R. Gibson of the Eighth Circuit; the Honorable Leonard I. Garth of the Third Circuit; and the Honorable Cornelia G. Kennedy of the Sixth Circuit.

judge from criminal prosecution prior to his removal from office by the impeachment process. Appellant, Harry Eugene Claiborne, is a United States Judge for the District of Nevada. He was appointed to the bench in August, 1978. On December 8, 1983, a seven count indictment was returned against Claiborne. Count I of the indictment alleged that Claiborne solicited and received $30,000 from Joseph Conforte, a Las Vegas brothel owner, in return for being influenced in the performance of offcial acts--i.e., decisions regarding motions in a pending case. (18 U.S.C. § 201(c)). Count II alleged that Claiborne caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte. (18 U.S.C. § 1343). The scheme to defraud allegedly involved Claiborne's accepting $55,000 from Conforte in return for promising to

secure the reversal of Conforte's criminal tax evasion conviction by bribing one or more judges on the Ninth Circuit Court of Appeals.[1]

Claiborne's trial is scheduled to begin on March 12, 1984. On January 3, 1984, Claiborne filed inter alia a motion to quash the indictment and to dismiss the proceedings against him, claiming the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through the impeachment process. The district

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1. Count III of the indictment charges that Claiborne obstructed the administration of justice by uring a witness to give false testimony before a federal grand jury investigating Claiborne. (18 U.S.C. § 1503). Counts IV, V, and VI charge that Claiborne failed to report the bribes as income on his tax returns. (26 U.S.C. § 72061(1)). Count VII, unrealted to the other charges, alleged that Claiborne had knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee (18 U.S.C. § 1001).

court judge[2] denied the motion by an amended order dated February 8, 1984. In that order, the trial court found Claiborne's claim "frivolus" and stated that the case would proceed to trial as scheduled on March 12, 1984. The district court also indicated its intention to hear other pretrial motions on February 21, 1984. Claiborne filed an interlocutory appeal of this order with the Ninth Circuit Court of Appeals. Characterizing the district court's order as "a final collateral order", Claiborne claims this interlocutory appeal vested exclusive jurisdiction in this court pursuant to 28 U.S.C. § 1291 and divested the district court of jurisdiction to proceed. Claiborne also filed an application for writ of prohibition and mandamus, seeking

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2. The Honorable Walter E. Hoffman of the Eastern District of Virginia, sitting by designation.

to stay the trial court from proceeding until this court resolved the merits of his interlocutory appeal. By an order dated February 16, 1984, we declined to stay the district court's proceedings of February 21, 1984, without prejudice. Claiborne renewed his motion for a stay on February 17, 1984.

I. Appealability

Claiborne's motion to dismiss was based upon the separation of powers principle of the Constitution and specific constitutional provisions which purportedly immunize a federal judge from criminal prosecution until he is removed from office by the impeachment process. As the parties agree, we have jurisdiction to review Claiborne's noncertified interlocutory appeal from the district court's dismissal of this claim.

Although 28 U.S.C. § 1291 limits appellate court's jurisdiction to "final decisions of the district courts", the Supreme Court has permitted departures frcm this rule where an interlocutory order falls into the "collateral order" exception announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949). Under that exception, an interlocutory order is immediately appealable if it "conclusively determines the disputed question, resolve[s] an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1981). In Abney v. United States, 431 U.S. 651, 659-60 (1977), the Court, applying Cohen, held that an interlocutory

order denying defendant's pre-trial motion to dismiss an indictment on double jeopardy grounds was immediately appealable. And in Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979), the Court held immediately reviewable a Congressman's pretrial claim that the Speech and Debate clause immunized him from criminal prosecution. Both Abney and Helstoski, in addition to satisfying the other requirements of Cohen, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Hollywood Motor, 458 U.S. at 266. The defendants in those two cases raised claims based upon "the right not to be tried, which must be upheld prior to trial if it is to be enjoyed at all." United States v. MacDonald, 435 U.S. 850, 860-61 (1978).

In United States v. Hastings, 681 F.2d 706 (5th Cir.), stay denied, 103 S.

Ct. 1188 (1982), the court concluded that a claim identical to the one raised here was an appealable collateral order. The defendant there, as here, contended that, under the separation of powers principle, an active federal judge has an absolute right not to be indicted and tried in a federal court unless and until he is impeached and convicted by Congress and removed from office. The court stated:

> Like the right secured by the speech or debate clause in Helstoski or the right secured by the double jeopardy clause in Abney, the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it.
>
> (Id. at 708)

We agree with Hastings and conclude we have jurisdiction to review the merits of Claiborne's claim. See also United States v. Meyers, 635 F.2d 932, 935-36 (2nd Cir. 1980) (Congressman's claim of

immunity from criminal prosecution under separation of powers principle held immediately appealable.)

II. Merits

Article III of the Constitution affords members of the federal judiciary substantial protections to assure their freedom from coercion or influence by the executive and legislative branches. Specifically, federal judges are appointed for life terms, subject only to removal by impeachment; they hold their offices "during good behavior"; and their compensation cannot be diminished during their continuance in office. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 15-16 (1955). In addition to these specific constitutional safeguards, federal judges, like state judges, enjoy an absolute common law immunity from civil liability for acts committed in their

official capacity. Stump v. Sparkman, 435 U.S. 349, 355-57 (1978).

However, in accordance with a system of checks of balances, the Framer's of the Constitution gave the legislative branch the power to deal with acts of misconduct by federal judges. Art. II, § 4 provides that "all civil officers of the United States[3] shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors". The House of Representatives is given the sole power of impeachment. Art. I, § 2. The Senate is given the sole power to try all impeachments. Art. I, § 3. The legislative power is limited insofar as the judgment entered after a conviction on impeachment cannot go beyond removal from office and disqual-

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3. Federal judges are "civil officers" within the meaning of this clause. Shurtleff v. United States, 189 U.S. 311, 316 (1903).

ification to hold future office. Art. I, § 3. Also, "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." Art. I, § 3 cl.7.

There is no specific constitutional provision limiting the executive branch's power to prosecute federal judges on criminal charges; nor is there any provision excepting federal judges from the executive branch's broad authority "to take care that the laws be faithfully executed." Art. II, § 3. Claiborne, however, contends that the Constitution's grant to the legislative branch of the power to remove a judge for high crimes and misdemeanors and the general principles of separation of powers preclude the executive branch from prosecuting hinge on criminal charges unless and

until he has been removed from office by impeachment.

Identical immunity claims were squarely faced and rejected in United States v. Hastings, 681 F.2d 706, 709-11 (5th Cir.), stay denied, 103 S. Ct. 1188 (1982) and United States v. Isaacs, 493 F.2d 1124, 1141-1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).[4] Both Hastings and Isaacs held that the Constitution does not immunize a sitting federal judge from the processes of criminal law. The sentiment underlying these holdings is that: "no man in this country is so high that he is above the law. . . . A judge no less than any other man is subject to the processes of the criminal law".

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4. Hastings and Isaacs are the only two cases where an indicted federal judge has claimed immunity from criminal prosecution prior to impeachment. Two other active federal judges were indicted on criminal charges, but neither raised the immunity issue. See Hastings, 681 F.2d at 706 n.7.

Hastings, 681 F.2d at 711; Isaacs, 493 F.2d at 1133. We wholeheartedly agree with Hastings and Isaacs and are substantially guided by them in disposing of Claiborne's arguments.

Claiborne's first argument is that specific constitutional provisions give Congress the exclusive primary jurisdiction to try and punish federal judges for high crimes and misdemeanors through the impeachment process. He principally relies upon article I, § 3 cl. 7 which states:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

According to Claiborne, this language means that a federal judge cannot be

indicted and tried in an Article III court unless he has been removed from office by the impeachment process. Both Isaacs and Hastings rejected this tortured interpretation, concluding that § 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." Isaacs, 493 F.2d at 1142, citing R. Berger, Impeachment: The Constitutional Problem, at 78-80 (1973); Hastings, 681 F.2d at 710. Hastings states:

> [S]ection 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural right of the accused during the impeachment process. Like article III, § 2 cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings, section 3 serves to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.
>
> (footnotes omitted.)

We agree with the Fifth and Seventh Circuits' reading of Article I § 3 cl. 7.

Claiborne also contends the Constitution's vesting of impeachment power exclusively in the Congress precludes criminal prosecutions of sitting federal judges. Two very important assumptions underlie this contention. First, impeachment is the exclusive means of removing federal judges from office; and second, a criminal prosecution is the equivalent of removal from office. We, like the court in Hastings, are unwilling to accept this second assumption. See Hastings, 681 F.2d at 710 n.10. In Burton v. United States, 202 U.S. 344 (1906), a United States Senator made the comparable claim that a criminal conviction was the equivalent of expulsion from the Senate, which required a two thirds vote of the Senate. The Court rejected this claim, stating: "the final judgment of conviction [does]

not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment". Id. at 369. In Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), both Mr. Justice Douglas and Mr. Justice Black noted the important distinction between criminal proceedings and impeachment proceedings against federal judges. Justice Black, while emphasizing that federal judges could be removed from office only by impeachment, stated that "judges, like other people, can be tried, convicted, and punished for crimes". Id. at 141-42. Justice Douglas stated that "[i]f they [federal judges] break a law they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress." Id. at 140. Finally, the

legislative history of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. § 372) is replete with statements recognizing that while Congress retains the exclusive power to remove federal judges from office for high crimes and misdemeanors, federal judges, like other people, are subject to criminal prosecution for thir misdeeds.[5]

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5. Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong. 1st and 2nd Sess. (1979-80).

Hunter, Elmo B., Judge, Western District of Missouri representing the Judicial Conference of the United States testified:

> Certainly, the members of the Court Administration Committee and of the Judicial Conference have been especially sensitive to that concern. They recognize that judges have no right to be insulated from the consequences of their own misbehavior when it impairs the proper operation of the courts and the administration of justice.

[Footnote Continued]

5. Continued

> First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.

Id. at 54-55. (Emphasis added).

Rodino, Peter W. (Rep. D. NJ) Chm. House Judiciary Committee testified:

> I believe [the impeachment process] was designed so in order that we be very careful and very deliberate about the application of this process of impeachment, and I think that if we look back, we find that impeachment being an action that is taken only as of last resort, really would serve us well only in such instances and only after all other possible actions may have been taken to cure whatever the problem may have been.
>
> . . .
>
> I just want to remind you that the Constitution itself provides that impeachment is no substitute for the ordinary application of the criminal laws, since in article I, section 3, it specifies that impeachment does not immunize the officer from criminal liability for his

5. Continued

> wrongdoing, and indeed may be brought to the bar of justice for the violation of any criminal statute.

Kastenmeier, Robert W., Chairman of Subcommittee stated:

> I would certainly concur with what the chairman [Rodino] said, that impeachment doesn't mean that you only try people who are guilty of violation of criminal laws; nor does it mean that you cannot be subjected to punishment under the criminal laws, even though impeachment does not occur.
>
> Id. at 138.

McClory, Robert, ranking minority member stated:

> For instance, if a circuit council received evidence that a crime had been committed, it would be inappropriate, it seems to me, to refer it to the Judiciary Committee for impeachment. Instead, it should be referred to a grand jury to determine whether or not the person should be indicted and tried. I believe that we want to avoid in legislation a requirement that all cases should be referred to the House Judiciary Committee for impeachment.
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> Id. at 141. (emphasis added).

5. Continued

Rosenberg, Maurice, Asst. Atty. Gen. Office for Improvements in the Admin. of Justice, stated:

> In terms, impeachment applies only if the offense is treason, bribery, high crimes, and other misdemeanors, but misconduct of that kind is, of course, a criminal offense and will be prosecuted criminally. Just a few days ago, on March 27, Chairman Rodino and the ranking minority member, Mr. McClory, testified that in the event criminal actions are brought against a Federal judge, as I understand it, the Judiciary Committee on the House side will stay its hand as far as impeachment proceedings are concerned until the criminal proceedings have run their course. If they eventuate in a conviction, then I don't expect that we will see in the future--we have not seen in the past--any judge remain on the bench after his conviction of an impeachable crime.
>
> That means if the sequence is criminal process first, then impeachment, we simply are not going to see impeachment used. The criminal process is so much broader than the impeachment process that impeachmnt is sort of a supplement to prosecution,

Claiborne's second line of argument finds its source in the salutary principles of separation of powers and judicial independence. Like the defendant in Hastings, he asserts that the judiciary would be subject to intolerable pressures from the executive branch if executive officers were permitted to prosecute

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5. Continued

> its purpose being to remove a judge convicted of a serious crime. Impeachment is not going to be often-used or effective if there is need for taking action against judges who have been guilty of reprehensible behavior that doesn't rise to the level of criminal prosecutability.

See also S. Rep. No. 362, 96th Cong. 1 Sess. 4 (1979), reprinted in 1980 U.S. Code & Ad. News 4315, 4318-19; H.R. Rep. No. 1313, 96th Cong., 2d Sess. 5 (1980).

Claiborne suggests the 1980 Act includes a determination by Congress that active federal judges may not be prosecuted by the Executive. In view of the foregoing legislative history and the language of the 1980 Act, we agree with Hastings that this claim is totally devoid of merit. See Hastings, 681 F.2d at 712 n.20.

active federal judges. He avers that immunity from criminal liability is a necessary complement to the specific safeguards of Article III -- most significantly, life tenure during good behavior. We disagree. Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing. See Isaacs, 493 F.2d at 1143. Hastings, 681 F.2d at 711. As the Supreme Court stated in United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the

> limitations which it imposes upon the exercise of the authority which it gives.

The Supreme Court has applied Lee's rationale in rejecting Congressmen's claims that they were immunized from criminal prosecution prior to expulsion. See Burton v. United States, 202 U.S. 344, 368 (1906); United States v. Brewster, 408 U.S. 501, 516-20 (1972). In Brewster, for example, a Senator charged with having taken a bribe (18 U.S.C. § 201) claimed that the Speech or Debate clause precluded criminal prosecution. The Court rejected this claim stating:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make members of Congress super-citizens, immune from criiminal responsibility.
>
> . . .

> The sweeping claims of appellee would render members of Congress virtually immune from a wide range of crimes simply because the acts were peripherally related to their holding office.
>
> . . .
>
> Depriving the Executive of the power to investigate and prosecute . . . bribery is unlikely to enhance legislative independence.

Id. at 516, 520, 525.

We similarly think it unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws. First, aside from Article III safeguards, judges enjoy the same protection as ordinary citizens do from vindictive prosecution. Hastings, 681 F.2d at 711. Second, as Brewster emphasized, a criminal prosecution encounters several procedural barriers -- such as the indictment, burden of proof, and presumption of innocence. The Court in Isaacs, referring to these

and other procedural safeguards afforded a criminal defendant, concluded that the independence of the judiciary is better served when criminal charges against judges are tried in court rather than in Congress. Isaacs, 493 F.2d at 1144. Indeed, it is all too well known that the impeachment process is particularly cumbersome, time consuming, and susceptible to political whim and emotional reaction. Third, the possible abuse by the executive branch is minimized because "[t]he check and balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." Brewster, 408 U.S. at 520. Finally, it is important to recognize that "criminal conduct is not part of the necessary functions performed by public officials. Punishment for that

conduct will not interfere with the legitimate operation of a branch of government." Isaacs, 493 F.2d at 1144. As perceptively noted in Brewster, 408 U.S. at 526: "Taking a bribe is, obviously, no part of the legislative process or function." This applies equally to the judicial branch.

In support of his claim that judicial independence will be substantially diminished without criminal immunity, Claiborne focuses on the practical consequences of an acquittal on criminal charges. He suggests that, if acquitted, his impartiality will be called into question every time he sits in a case in which the executive branch is a party. Purportedly, this will unduly diminish Claiborne's judicial authority and disrupt the judiciary's ability to administer its own affairs.

Though this argument has some persuasive appeal it does not carry the day. First, we think Claiborne has overstated the ability of the executive branch to force the recusal of an acquitted federal judge on bias grounds. The Supreme Court has stated that the trial judge's bias is presumed only where the judge has a personal or financial stake in the outcome or has been the target of personal abuse or criticism. See Withrow v. Larkin, 421 U.S. 35, 47 (1975); Taylor v. Hayes, 418 U.S. 488, 501-03 (1974); see also S. Rep. No. 419, 93d Cong. 1st Sess. 5 (1973). (the "appearance of impartiality" test of 28 U.S.C. § 455(a) was not intended to "warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial.") The second and more compelling

reason we reject Claiborne's claim is that the proposed solution to the problem is much worse than the problem itself. As Hastings states, "the minuscule incremental judicial independence that might be derived from [a rule granting sitting federal judges immunity from criminal prosecution] would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law." 681 F.2d at 711. It can scarcely be doubted that the citizenry would justifiably lose respect for and confidence in a system of government under which judges were apparently held to be above the processes of the criminal law.[6]

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6. In urging Hastings and Isaacs were wrongly decided, Claiborne relies heavily on Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)

[Footnote continued]

6. [Continued]

and Nixon v. Fitzgerald, 457 U.S. 731 (1982). Both cases are inapposite and of no aid to Claiborne. Northern Pipeline, which invalidated the Bankruptcy Act of 1978 insofar as it conferred Article III powers on non Article III judges, simply emphasized the importance of providihg Article III judges with the appropriate protections of salary stability and life tenure. Nixon v. Fitzgerald, giving the President absolute immunity from civil damages for his official acts, merely cites cases recognizing that judges are absolutely immune from civil liability for acts committed in their official capacity. The "public interest" justification for granting immunity in civil suits against judges would not similarly apply to criminal actions. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974), where the court states:

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of Constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so as to immunize criminal conduct proscribed by an Act of Congress. . . ." Gravel v. United States, 408 U.S. 606, 627 (1972).

[Footnote Continued]

III. Non-appealable Claim

Claiborne's second claim on this appeal is that the government's investigation and prosecution was motivated by a desire to retaliate against him for the manner in which he had exercised the functions of his office. He claims that the constitutional principal of an independent federal judiciary requires that the district court hold pre-trial evidentiary hearings to determine whether the executive's prosecution was improperly motivated.

Claiborne raises what is essentially a vindictive or selective prosecution claim, which is not immediately appealable under "the collateral order" exception. United States v. Hollywood Motor Car Co.,

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5. Continued

Cf. Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (state judge who is immune from civil liability is not immune from criminal liability).

458 U.S. 263, 277 (1982). Under the logic of Hollywood Motor, such a claim fails to meet Cohen's requirement of being "effectively unreviewable on appeal from final judgment." To afford Claiborne the interlocutory relief he seeks in the name of judicial independence would have the effect of giving him more protection that ordinary citizens raising similar claims enjoy. See Hastings, 681 F.2d at 711.

IV. District Courts Jurisdiction to Proceed

Having determined that Claiborne's first claim, though appealable, lacks merit, we must determine whether the district court ever lost jurisdiction to proceed. Specifically, we must decide whether the district court had jurisdiction to hear the pre-trial motions of February 21, 1984.

Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under Abney, the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved. United States v. Yellow Freight System, Inc., 637 F.2d 1248, 1252 (9th Cir. 1980), citing Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978); United States v. Garner, 663 F.2d 834, 837-38 (9th Cir. 1981); United States v. Burt, 619 F.2d 831, 838 (9th Cir. 1980). See Griggs v. Provident Consumer Discount Co., ___ U.S. ___, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). This divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil

appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Hitchmon, 602 F.2d 689, 691-92 (5th Cir. 1979) (en banc). Given this purpose, it has been suggested that "the rule should not be employed to defeat its purpose or to induce needless paper shuffling." 9 J. Moore, Federal Practice, ¶ 203.11 at 3-44 n.1 (1980); see also C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 3949, at 358-59 (1977).

The divestiture rule takes on added significance when aplied to interlocutory Abney-type criminal appeals since two important countervailing policies are at work. On the one hand, a defendant raising a meritorious Abney-type claim -- asserting a valid, constitutional "right

not to be tried" -- would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal. On the other hand, under an automatic divestiture rule, a defendant raising a meritless Abney-type claim could significantly delay and disrupt criminal trial court proceedings. Burt, 619 F.2d at 838. See also Abney, 431 U.S. at 656-57 ("the delays and disruptions attendant upon intermediate appeal . . . are especially inimical to the effective and fair administration of the criminal law"). The Court in Abney, mindful of the need to balance these two interests, directed appellate courts to exercise their supervisory powers to establish summary procedures for quickly disposing of frivolous, dilatory pre-trial appeals.

The Fifth Circuit in United States v. Dunbar, 611 F.2d 985, 987-89 (5th Cir.),

cert. denied, 447 U.S. 9266 (1980) (en banc; twenty five judges) followed Abney's directive and adopted the "dual jurisdiction" rule that "appeal from the denial of a frivolous [Abney-type] motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous." This approach has been uniformly followed by other circuits. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Head, 697 F.2d 1200, 1204 n.4 (4th Cir. 1982); United States v. Lanci, 669 F.2d 391, 394 (6th Cir. 1982); United States v. Cannon, 715 F.2d 1228 (7th Cir. 1982); United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982) (en banc).

The Ninth Circuit[7] implicitly adopted Dunbar's dual jurisdiction

7. Sitting as special panel for the Ninth Circuit, we are bound by applicable Ninth Circuit case law.

approach in United States v. Spilotro, 680 F.2d 612, 615 (9th Cir. 1982) and in United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982). Both Spilotro and Crozier held that the interlocutory review of a collateral order restraining the sale or transfer of defendant's property did not divest the district court of jurisdiction to proceed. The Ninth Circuit, however, has yet to adopt Dunbar in the context of an Abney-type claim involving a "right not to be tried". This reluctance is due to the Ninth Circuit's concern that a defendant who has raised a meritorious Abney-type claim would be irreparably harmed if the trial court were allowed to proceed to trial prior to the appellate court's disposition of the claim. Burt, 619 F.2d at 838. This concern is not as vitally involved when only pre-trial hearings proceed in the district court rather than the trial

itself. Because this court has now determined that Claiborne's asserted "right not to be tried" claim lacks merit, the trial court's continuation of pre-trial hearings was harmless. Requiring the district court to rehear and rule again on the same matters would achieve nothing other than to significantly disrupt and delay an ongoing criminal trial, a result running afoul of the purpose behind the divestiture rule and the court's dictum in Abney. As the court stated in Leppo, 634 F.2d at 104, "[a] ritualistic application of the divestiture rule in the Abney context conflicts with the public policy favoring rapid adjudication of criminal prosecutions."

The district court scrupulously followed the procedures set forth in Dunbar by finding, as a predicate to its assertion of retained jurisdiction, that Claiborne's separation of powers claim was

frivolous. Though we now disagree with that characterization of Claiborne's claim, no useful purpose would be served by requiring that court to redecide the pre-trial motions on February 21, 1984. Under the circumstances, therefore, it was harmless for the district court to proceed to hear the motions of February 21, 1984. See Hastings, 681 F.2d at 709, n.4. (Court, while characterizing defendant's separation of powers claim as "nonfrivolous", nevertheless recognized that under Dunbar "the trial court could have determined that the issues raised . . . were frivolous and then proceeded to trial without awaiting the determination of the court of appeals").

However, in view of the jurisdictional problems to which we have referred, we suggest that the district court reenter on the record the motions, findings, and other matters contained in the hearing

transcript of February 21, 1984, without the need for reargument or retaking testimony.

We therefore affirm the district court's order denying Claiborne's motion to quash the indictment; we deny the petitions for writs of mandamus and prohibition, and deny as moot the renewed motion for a stay. Let the mandate issue forthwith.

FILED
December 10, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY E. CLAIBORNE, Defendant-Appellant.	)	No. 84-1294 DC# CR 83-57 WEH ORDER

Before: LUMBARD, PELL, and McWilliams*, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to recommend rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for an en banc hearing. A vote was requested and taken, and failed to receive a majority of the votes of the

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* Circuit Judges of the Second, Seventh and Tenth Circuits, sitting by designation.

non-recused judges. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed
December 30, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

United States v. Claiborne, No. 84-1294

FERGUSON, Circuit Judge, dissenting from the order denying hearing en banc.

The refusal of the court to rehear this case en banc is lamentable. When the prosecution withholds vital exculpatory information, justice is denied. Rehearing en banc is necessary to correct the substantial curtailment of a defendant's right to discover impeachment material pursuant to the Jencks Act, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83 (1963).

Defense access to exculpatory or empeachment evidence within the government's possession is a vital constitutional and statutory right. See Brady, 373 U.S. at 87; United States v. Polizzi,

500 F.2d 856, 893 (9th Cir. 1974) ("The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment."), cert. denied, 419 U.S. 1120 (1975). Impeachment evidence plays a pivotal role in any trial, see, e.g., Davis v. Alaska, 415 U.S. 308, 316 (1974), and withholding impeachment evidence in this case denied the defendant an effective defense.

Claiborne, a United States district court judge, was convicted of income tax evasion. His accountant, Wright, was an important prosecution witness. At trial, Claiborne presented evidence that his secretary delivered a letter to Wright revising the amount of his income. Wright testified that he had no recollection of receiving the letter and further that he

never lost client files. Thus, Claiborne's conviction hinged on Wright's credibility. Regrettably, the government and the trial judge failed to furnish Claiborne during the trial with damaging pretrial statements made by Wright.

Government agents' summaries of pretrial interviews with Wright indicate that he admitted to them that a substantial number of his client's files had been "thrown away." Despite a standing request under the Jencks Act and Brady for witnesses' pretrial statements, the defense learned of the summaries only after trial. At a posttrial hearing, the trial judge disclosed the existence of the summaries of the Wright interviews.

Although the judge reviewed some of the in camera material during trial, he examined none of the Wright material at that time. At the posttrial hearing, he

reviewed some of the Wright material and concluded that none of it was Jencks Act or Brady impeachment material. Further, he failed to examine the remaining in camera material, some of which might have impeached Wright's testimony.

On appeal, the panel admitted that the Wright summaries were Brady impeachment evidence, but erroneously concluded that the failure to disclose the material was not prejudicial to the defense. United States v. Claiborne, 765 F.2d 784, 802-04 (9th Cir. 1985). The panel's Brady analysis ignored United States v. Bagley, 105 S.Ct. 3375 (1985), announced six days before Claiborne. Under Bagley,

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 3384. The panel should have decided whether suppression of the Wright interview material "undermined confidence in the outcome of the trial." Instead, the panel employed a two part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. Claiborne, 765 F.2d at 802-03.

Ample evidence from the record supports the conclusion that suppression of the material undermines confidence in the trial outcome. Wright was a keywitness in the government's case. Evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly undermine his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, Claiborne's conviction should have been

reversed because the government withheld Brady impeachment evidence of one of its key witnesses.

Similarly, the panel's Jencks Act analysis was incorrect. The panel denied Claiborne access to the Wright summaries because they were not transcribed "in a substantially verbatim fashion" and the government agents did not draft them contemporaneously with Wright's interview. Id. at 801. After Claiborne, the government need only produce 18 U.S.C. § 3500(e)(1) statements actually read or drafted by the witness, and 18 U.S.C. § 3500 (e)(2) statements drafted by an agent before the interview is over. This reasoning conflicts with Campbell v. United States, 373 U.S. 487 (1963), and significantly reduces a defendant's ability in this circuit to obtain witness statements taken by government agents.

Under Campbell, section 3500(e)(1) statements need not be signed or written by the witness, or even be a substantially verbatim recording of a prior statement. Id. at 492 n.6. The Court held that the FBI agent's recitation of the "substance" of his rough notes, which were "not a complete word-for-word transcription" of the interview, demonstrated sufficient adoption by the witness for purposes of the Jencks Act when the witness told the agent "he had got it straight." Id. at 489-90. The FBI agent wrote his report, based on rough notes and personal memory, seven hours after the witness interview. Id. at 490. The Court imposed no requirement or expectation that the agent draft a witness statement during an interview. Rather, Campbell recognized the informal and commonplace FBI practice of taking rough notes during an interview and later

transcribing them into statements. This practice in Campbell made the witness statements no less susceptible to disclosure under the Jencks Act.

The fundamental error the panel committed was its failure to conduct an independent examination of the materials on which the trial court based its rulings. I fail to see how the panel, without looking at that material, could have fairly decided whether those rulings were erroneous [sic]. A reviewing court has an obligation to examine Brady and Jencks Act material to ensure that the district court's rulings were correct. See Campbell, 373 U.S. at 493. After the district court judge opened the in camera material at the posttrial hearing, he resealed the withheld documents. The documents have not been unsealed or read by anyone since the district court's

posttrial hearing.

The en banc call in this case has been difficult for the judges of this circuit. It may be that hearing the case en banc and potentially reversing the conviction would be viewed by the public as defending one of our own rather than fairly applying the law. However, a defendant's right to a constitutionally fair trial cannot be balanced against the perception of others. Of course, we have an obligation to ensure that the circuit's actions are evenhanded and unbiased. But that duty is not jeopardized here. We must uphold our responsibility to remedy violations of constitutional rights, and I dissent from the court's refusal to hear this case en banc.

FILED
December 16, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY E. CLAIBORNE, Defendant-Appellant.	)	No. 84-1294 DC# CR 83-57 WEH ORDER

Before: LUMBARD, PELL, and McWilliams*, Circuit Judges.

Appellant's motion for a stay of mandate is granted, in part. The mandate is stayed for thirty (30) days. If a petition for a writ of certiorari is filed within thirty days, this stay shall continue until the petition is finally disposed of. See Fed. R. App. P. 41(b).

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* Circuit Judges of the Second, Seventh and Tenth Circuits, sitting by designation.

Filed Dec. 8, 1983

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. HARRY EUGENE CLAIBORNE, Defendant.	) Criminal No. CR-R-83-57-WEH) INDICTMENT) [18 U.S.C. §§ 201, 7342, 503, 1001]) [26 U.S.C. § 7206(1)]

THE GRAND JURY CHARGES:

COUNT I

Between on or about December 14, 1978 and December 15, 1978, in the District of Nevada, the Defendant, HARRY EUGENE CLAIBORNE, being a public official, that is a United States District Court Judge for the District of Nevada, directly and indirectly, corruptly asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive for himself a thing of value, that is United States currency in the amount of $30,000, from Joseph Conforte, in return for being

influenced in his performance of an official act, that is the decisions and rulings that he made and was to make and the timing of those rulings with regard to two consolidated motions to quash grand jury subpoenas then pending before him, said motions captioned, In the Matter of Application of Olga Irene Karaway For an Order to Show Cause, Misc. R-78-36, and In Re Grand Jury Subpoena Served on Sessina Lowe, Misc. R-78-35; in violation of Title 18, United States Code, Section 201(c).

COUNT II

1. From on or about March 8, 1979 and continuing to and including April 30, 1980 in the District of Nevada and elsewhere HARRY EUGENE CLAIBORNE, named herein as the defendant, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by

means of false and fraudulent pretenses, representations, and promises to Joseph Conforte, well knowing that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme is more fully set forth below.

2. It was a part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that he could corruptly secure the reversal of the criminal convictions of Joseph and Sally Conforte in the case of United States v. Joseph Conforte, et. al., (No. 77-3956 and No. 78-3310).

3. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that, in order to secure the reversal of the criminal convictions of Joseph and Sally Conforte, he would bribe one or more judges of the United States Court of Appeals for the Ninth Circuit.

4. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would represent that the said corrupt reversal of the criminal convictions of Joseph and Sally Conforte would be accomplished in consideration of $55,000 paid on or about March 8, 1979, and $45,000 that would be required to be paid to the defendant at a later date.

5. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would make certain false statements to Joseph Conforte and Stanley Brown, Sr., as agent for Joseph Conforte, to lull Joseph Conforte into believing that his conviction would be reversed and that the defendant was the person responsible for corruptly causing the reversal.

6. In furtherance of that portion of the scheme to defraud as described in

Paragraph No. 5 above, the defendant, HARRY E. CLAIBORNE, did, on several occasions, falsely advise Joseph Conforte and Stanley Brown, Sr. that the defendant had, on several occasions, spoken with the judges of the United States Court of Appeals for the Ninth Circuit and that those judges had advised the defendant that they would reverse the conviction of Joseph Conforte.

7. On or about June 3, 1979, in the District of Nevada, the defendant, HARRY E. CLAIBORNE, for the purposes of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause to be transmitted in interstate commerce by means of a wire communication, that is, a telephone communication, between a location within the State of California and Reno in the State of Nevada, certain signs, signals and sounds, in violation of

Section 1343 of Title 18 United States Code.

COUNT III

Between on or about April 30, 1982 and July 1, 1982, in the District of Nevada, the Defendant, HARRY E. CLAIBORNE, willfully and knowingly, corruptly did endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Oregon, in that the said, HARRY E. CLAIBORNE, knowing that one Stanley Brown, Sr., had received a subpoena requiring him to appear on May 11, 1982 and that he intended to reappear at an undetermined date following July 2, 1982, before the Grand Jury for the District of Oregon which was inquiring into possible violations of the federal bribery laws, urged, advised and persuaded Stanley Brown, Sr. to give false testimony

before said Grand Jury in relation to the aforesaid investigation; in violation of Title 18, United States Code, Section 1503.

COUNT IV

On or about October 15, 1979, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 21) in the amount of $92,340.44 whereas, as he then and there well knew and believed he

received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT V

On or about June 15, 1980, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $80,227.04 whereas, as he then and there well knew and believed he received substantial income in addition to that

heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VI

On or about June 15, 1981, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $54,251.00 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VII

1. At all times pertinent herein HARRY EUGENE CLAIBORNE, Defendant herein, was a Judge of the United States District Court for the District of Nevada.

2. At all times pertinent herein the Ethics in Government Act of 1978, Public Law 95-521, required, among other things, that every year each Judge of the United States District Courts submit a report disclosing items describing the nature and extent of financial holdings, liabilities and transactions including, among other things, loans owed by the Judge at any time during the portions of the previous calendar year that the individual was a Judge.

3. On or about June 20, 1979, in the District of Nevada, HARRY EUGENE CLAIBORNE, Defendant herein, did willfully and knowingly make and use and cause to be

made and used a false writing and document knowing it to contain a false, fictitious and fraudulent statement and entry as to a material fact in a matter within the jurisdiction of the Judicial Ethics Committee of the Judicial Conference of the United States ("Committee"), a department or agency of the United States in that in his financial disclosure report for the calendar year 1978, made pursuant to the Ethics in Government Act of 1978, Public Law 95-521, and submitted to the Committee, HARRY EUGENE CLAIBORNE misrepresented the extent and nature of his financial liabilities existent during the calendar year 1978, in that he excluded an outstanding personal loan of $76,000 made to him by a person or persons unknown to the grand jury whereas, in truth and fact, as HARRY EUGENE CLAIBORNE then knew, said loan was made, did exist, and was

outstanding at some time during the portion of the calendar year 1978 that the Defendant was a United States District Judge, in violation of Title 18, United States Code, Section 1001.

A TRUE BILL

_____
Foreman

_____
STEVEN A SHAW
Attorney
Public Integrity Section
Criminal Division
Department of Justice
Washington, D.C. 20530

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR-R-83-57-WEH
HARRY EUGENE CLAIBORNE, Defendant.	)	

MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne moves that this Court enter an order quashing the indictment and dismissing the proceedings against him on the grounds that:

a. The Constitution requires that impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive and the judicial power by the Judiciary to determine whether conduct in office by a United States judge in active service constitutes

high crimes or misdemeanors under the laws of the United States; and

b. The Executive's actions in investigating and using the grand jury to investigate Judge Claiborne's conduct in office have violated the Constitution and are inconsistent with the principles designed to keep separate the powers of government and the provisions adopted to guaranty the independence of the Judiciary by guaranteeing the independence of the individual federal judge.

In support of this Motion, Judge Claiborne states:

1. In 1978, President James Earl Carter nominated Harry Eugene Claiborne to be a United States District Judge on the United States District Court for the District of Nevada. The Executive Branch conducted a full investigation and the Senate of the United States held hearings

to satisfy themselves that the professional and personal experience and qualifications of Harry Eugene Claiborne qualified him for appointment to that post. With knowledge and information developed, the Senate exercised its constitutional function and gave its advice and consent to the appointment of Harry Eugene Claiborne as a United States Judge. In August, 1978, with that advice and consent and having fully satisfied himself that the appointment of Harry Eugene Claiborne was consistent with the policies of the then Executive, the President exercised his constitutional function and perogative and appointed Harry Eugene Claiborne a United States District Judge.

2. Judge Claiborne took the required oath and assumed judicial office on September 1, 1978. He has been a judge in

active service on this Court since that date, becoming its chief judge on May 1, 1980. He has been, is, and will remain entitled to hold and exercise the powers of that office free from coercion or undue interference by the Executive unless and until he is impeached by the House of Representatives for, and convicted by the Senate of, "Treason, Bribery, or other high Crimes and Misdemeanors" (U.S. Const., art. I, §§ 2 and 3; art. II, § 4; and art. III, §§ 1 and 2).

3. In exercising the powers and performing the duties of a United States district judge, Judge Claiborne has regularly had to decide cases and controversies to which the United States was a party and in which the interests of the United States were asserted by attorneys acting under the supervision and control of the Attorney General of the United

States. Since assuming the duties of his office, in the exercise of independent judicial discretion, Judge Clairborne has frequently found it necessary to render decisions adverse to positions vigorously asserted by attorneys for the United States, including attorneys responsible for exercising the Executive's investigatory powers and prosecutorial discretion and for prosecuting persons charged with violating the laws of the United States. These decisions have made Judge Claiborne unpopular with some of the attorneys who represent the United States and with other agents who act under the control and supervision of the Attorney General of the United States.

4. Since 1978 and continuing to the present, attorneys and other persons acting under the supervision and control of the Attorney General of the United

States have used the investigative and prosecutorial powers of the Executive and have invoked the criminal processes of the federal courts to develop facts upon which they might induce a federal grand jury to return an indictment against Judge Claiborne.

5. The Executive has been motivated in exercising these powers by an intent to retaliate against Judge Claiborne and to bring coercive pressure upon him for the manner in which he has exercised the judicial power in cases to which the Executive was a party and for other actions he has taken as a judge.

6. The actions of the Executive's attorneys in investigating Judge Claiborne during the past five years have disrupted the judiciary in the District of Nevada and the Ninth Circuit and have interfered with Judge Claiborne's right and ability

to exercise the functions of his office freely and properly. By its actions in obtaining and filing the indictment, the Executive (a) has forced Judge Claiborne to declare a mistrial in a major prosecution in which a jury had been impanelled and substantial evidence taken; (b) has compelled the reassignment of all cases pending before Judge Claiborne; (c) has required the designation of a judge from outside the circuit, disrupting the judicial business of the Eastern District of Virginia as well as that of the District of Nevada and interfered with the right and ability of the judges of this district to manage and control the judicial business of this district; and (d) has attempted to force this Court to adjudicate a claim by the Executive that a member of this Court has, by his conduct in office, committed high crimes and

misdemeanors under the laws of the United States.

7. There are more than 500 United States District Judges in active service. The proper exercise of the judicial function requires that each be free, and be seen by the people to be free, to exercise the judicial power in cases and controversies to which the United States is a party without fear of coercion or retaliation by attorneys for the United States who may be dissatisfied with a judge's exercise of the judicial function.

8. The existence and exercise of the powers the Executive has exercised here against Judge Claiborne is inconsistent with the guarantee that United States judges will have life tenure subject only to the powers of impeachment and removal vested in the Legislative Branch. The existence of these powers and their

exercise against Judge Claiborne cannot be reconciled with the doctrines developed to assure the powers of government would be kept separate and exercised by independent and coordinate branches of government.

9. The specific manner in which and the intent with which the Executive has exercised its powers and used the grand jury and other criminal processes of the courts to obtain an indictment against Judge Claiborne directly violates the purpose and function of the provisions granting him life tenure and assigning the sole power of impeachment to the House of Representatives.

Accordingly, for the reasons set forth above, for those developed in the accompanying Memorandum of Law, and in light of the facts to be shown upon an evidentiary hearing on the allegations set forth in this motion, United States

District Judge Harry Eugene Claiborne requests that this Court enter an order quashing the indictment and dismissing these proceedings and granting him such other and further relief as the Constitution and the nature of his office may require.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
WILLIAM RAGGIO, ESQ.
JOHN SQUIRE DRENDEL, ESQ.

By _____
OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for Defendant

By _____
TERENCE J. ANDERSON, ESQ.
ROBERT S. CATZ, ESQ.
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
Telephone: (305) 284-2971
As Counsel to Oscar Goodman, Esq.
Attorney for the Honorable
Harry Eugene Claiborne

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. HARRY EUGENE CLAIBORNE, Defendant.	)	CR-R-83-57-WEH

SUPPLEMENTAL MEMORANDUM AND PROFFER IN SUPPORT OF REQUEST FOR FACTUAL PROCEEDINGS ON MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne files this Supplemental Memorandum and Proffer to assure that this Court is properly advised and that the record is clear with respect to his request, in the alternative, for factual proceedings in connection with his Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers (the "Motion").

Preliminary Statement

By the Motion, Judge Claiborne made two claims. First, he asserted that the Constitution defined the correct sequence of remedies for allegations of malconduct in office against a federal judge: impeachment and removal by the Congress and then, but only then, executive prosecution and judicial trial. Second, and in the alternative, Judge Claiborne asserted that, if the constitutional prohibition against executive prosecution and judicial trial prior to legislative impeachment and removal was not absolute, then, and at a minimum, the Court must conduct factual proceedings to determine whether the specific manner in which and intent with which the government had initiated and conducted the investigation and obtained the indictment against him was inconsistent with the rights and

privileges guaranteed every federal judge as incidents to the judicial office.

At a hearing held on January 9, 1984, this Court orally stated that the Motion would be denied. At the same time, the Court indicated that it did not perceive the relevance and was concerned by the time being consumed by counsel's attempted oral proffer of facts relevant to the Motion's second claim. This Supplemental Memorandum and Proffer is submitted to assure that the basis upon which these facts are deemed relevant is clear and to submit an adequate proffer without consuming further time by oral proceedings.

Supplemental Memorandum

The Supreme Court has long recognized that there are certain constitutional claims that a defendant may assert in criminal proceedings that are collateral to the question of guilt or innocence and

so important that they must be resolved prior to any trial on the merits, e.g. Abney v. United States, 431 U.S. 651 (1977). Some of these claims require that the trial court conduct evidentiary proceedings to determine whether the claims asserted are valued, e.g. double jeopardy claims such as those asserted in Abney.

The Supreme Court has also recognized that claims by a public official that the Constitution prohibits specific proceedings against him raise collateral questions that may require factual proceedings and that must be resolved before the merits can be reached. Helstoski v. Meanor, 442 U.S. 500 (1979); Nixon v. Fitzgerald, 457 U.S. 731 (1982); see also United States v. Brewster, 408 U.S. 501 (1972).

By the Motion, Judge Claiborne asserts that at a minimum this Court must conduct factual proceedings to determine whether the Executive's decisions to investigate his conduct in office, its decisions and conduct with respect to the manner in which its investigations were conducted and the grand juries used, and its decision, its conduct in obtaining the indictment here evidence an intent to retaliate against him for the manner in which he has exercised the judicial function or a conspiracy among officials of the Executive to drive him from office or burden his ability to act as a judge in the future in matters in which the Executive has an interest.

These claims are based solely upon the rights and guarantees embodied in the Constitution to guarantee the independence of the Judiciary and to maintain the

proper separation of executive, legislative, and judicial function and powers. The constitutional bases upon which Judge Claiborne asserts these claims is wholly different from the bases upon which Harry Eugene Claiborne as an individual, asserts similar claims based upon his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution. The facts underlying both types of claims however, are similar. That is why the factual allegations contained many of defendant's other pretrial motions are incorporated in the proffer.

The fact that the bases for the claims Judge Claiborne asserts in the Motion are incident to the judicial office creates two other significant distinctions from the claims he asserts as an individual. First, because these judicial office claims are collateral, both the discovery

and the evidentiary proceedings should be completed on the Motion before the Court proceeds to trial or hearings on the merits. For that reason, the proffer also identifies and incorporates discovery motions relevant to the claims asserted by the Motion. Second, the burden of proof and the burden of going forward should also be different for the claims asserted by the Motion than that established for individuals asserting comparable claims in pre-trial motions. The Supreme Court's reiteration that the Constitution "commands that the independence of the Judiciary be jealously guarded. . ." makes this clear. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

In sum, if the Court had found that Judge Claiborne was entitled to evidenti-

ary proceedings on the Motion, Judge Claiborne would have:

1. Offered evidence to establish the factual allegations made in the Motion, in the supporting Memorandum, and in the other pre-trial motions incorporated in the proffer;

2. Offered evidence to prove the specific facts alleged in the proffer;

3. Asserted rights, in connection with proceedings on the Motion, to discover the information requested in the motions incorporated into the proffer, subject to such protective orders or agreements as may be necessary to protect the government's legitimate interests; and

4. With such discovery as the Court granted, offered evidence to prove or tending to prove the facts supporting the claims asserted in the Motion.

Proffer

Judge Claiborne proffers that, if the court permitted hearings upon the claims asserted in the Motions, the evidence would show or tend to support an inference that:

1. Prior to his appointment to judicial office, the FBI investigated him and submitted negative evaluation of his fitness and recommended he not be appointed. The Senate was aware of that report and recommendation at the time it exercised its constitutional prerogative and unanimously consented to the apointment of Harry Eugene Claiborne as a United States District Judge. President Carter and his advisors were aware of that report and recommendation at the time the President exercised his constitutional prerogative and appointed Harry Eugene Claiborne as United States Judge. Judge Claiborne

would prove these allegations, if the government denied them, by subpoenaing from the government, the report and recommendations and records and testimony showing that it has been communicated to the office of the President and to the appropriate committee of the Senate.

2. Notwithstanding the President's decision to reject the FBI's evaluation and recommendations and to appoint Judge Claiborne, subordinate officials of the FBI continued their investigation into Judge Claiborne's pre-judicial conduct after he had taken office. As part of that investigation, they used the processes of a federal grand jury in Las Vegas, Nevada, but were unable to obtain or present evidence sufficient to obtain an indictment. Judge Claiborne would support these allegations, if the government denied them: (a) by asking that this

Court examine the records of the grand juries sitting in Las Vegas, Nevada, during the period September 1, 1978 through December 31, 1980, for the purposes of establishing the existence and result of these investigation and (b) by subpoenaing Geoffery Anderson, former Chief of the United States Department of Justice Organized Strike Force in Las Vegas, Nevada; and Joseph Yablonsky, agent-in-charge, of the Nevada office of the FBI, as an adverse witness, to elicit testimony as to the investigative activities conducted under their supervision and with their knowledge during that period; (c) by subpoenaing the Honorable Roger Foley, senior United States District Judge and others to provide testimony and documents evidencing an open, notorious, and flagrant declared intent by Strike Force attorneys and FBI agents to use the

powers of their offices to drive Judge Claiborne and and other federal judges from office or to so impair his ability to function that he would not be able to preside in cases in which those agencies objected to his participation.

3. Between 1978 and the present, attorneys employed by the United States Department of Justice and agents of the Federal Bureau of Investigation have improperly threatened and attempted to intimidate individuals other than Judge Claiborne in order to induce such individuals to give testimony that would implicate Judge Claiborne in criminal or improper judicial activity. Specifically, Judge Claiborne incorporates the facts alleged in and incorporated into Defendant's Motion to Dismiss Indictment for Selective Prosecution and Multiform Governmental Misconduct and Abuse and For

Evidentiary Hearing (No. 26). In support of these allegations, if the government denied them, Judge Claiborne would subpoena and call the individuals named in that motion and its attachments and would subpoena and introduce the documents and reports described therein.

4. From April 8, 1980, to December 8, 1983, attorneys for the Strike Force and the Public Integrity Section, including Geoffery Anderson and Steven Shaw, with the support and assistance of federal agents, including Joseph Yablonsky, have continuously employed federal grand juries and other investigative techniques to obtain evidence and intimidate others to provide evidence that Judge Claiborne had engaged in improper conduct. Judge Claiborne incorporates as part of this Proffer the facts alleged in his Motion to Dismiss for Grand Jury Abuse; to Discover

Grand Jury Materials; to Interview Grand Juries; and for Evidentiary Hearing (the "Grand Jury Motion"; (No. 28). Judge Claiborne also incorporates as part of this proffer the facts alleged in his Motion to Disqualify Special Prosecutor (the "Shaw Motion") (No. 21). To support these allegations, if the government denied them, Judge Claiborne would call: Geoffrey Anderson, Joseph Yablonsky, Steven Shaw, the Honorable Roger Foley, Eddie LaRue, Ralph Lamb, John Moran, the Honorable Thomas O'Donnell, FBI Agent Patrick Murphy, former Las Vegas Police Detective Chuck Lee, Joseph Conforte, the Honorable Warren J. Ferguson, former District IRS Director Gerald Swanson, Peter Perry, Peter Lemberes, Alex Lemberes, Treasury Department Investigator Roderick Loss, James Brown, the Honorable Floyd Lamb, Leland Lutfy, the Honorable

Phillip Pro, Jerry Watson, Oscar B. Goodman, Lawrence Semenza, the Honorable Lamond Mills, and other persons named in the Grand Jury Motion and the Shaw Motion. Each would be called to testify with respect to facts that are identified as within his or her competence and that are set forth in detail in the Grand Jury Motion and the Shaw Motion. (Those who are presently employed as attorneys or agents for the Executive or who otherwise evidenced a reluctance to testify would be summoned as adverse witnesses.)

5. Judge Claiborne also incorporates specific allegations in this proffer the facts alleged in or incorporated into his pre-trial motions Nos. 2, 3, 10, and 25 (as numbered and identified in his Certificate of Service by Mailing and in the Appendix to Government's Response to Defendant's Pretrial Motions). In

addition to the witnesses previously named in this proffer, Judge Claiborne would call Stanley Brown as an adverse witness to testify with respect to his role in the representation of Joseph Conforte, the investigation of Judge Claiborne, and his conversations with agents and attorneys for the Justice Department and the FBI.

6. Judge Claiborne also incorporates the requests for discovery made in his pre-trial motions Nos. 1, 2, 3, 7, 8, 11, 15 (limited here to Joseph Conforte and such other witnesses who may be in the custody of, or being concealed by, the government), 16, 18, 19, 20, 27, and 30 and asserts them as discovery requests made in connection with the requests asserted in the Motion and upon the constitutional rights and privilege claimed in the Motion. As part of this

proffer; Judge Claiborne would expect to use the documents, testimony, and other evidence produced pursuant this Court's orders on these pre-trial motions to support the facts alleged in the Motion and in the facts set forth in this proffer.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
WILLIAM RAGGIO, ESQ.
JOHN SQUIRE DRENDEL, ESQ.

By_____
OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for United States District Judge Harry Eugene Claiborne.

By _____
TERENCE J. ANDERSON, ESQ.
ROBERT S. CATZ, ESQ.
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
Telephone: (305) 284-2971

As Counsel to Oscar Goodman, Esq.
Attorney for the Honorable
Harry Eugene Claiborne.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) CR-R-83-57-WEH
)
HARRY EUGENE CLAIBORNE,)
Defendant.)

ORDER

This court having considered the Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers, the memoranda in support thereof and opposition thereto, and the Supplemental Memorandum and Proffer in Support of Requested Factual Proceedings;

IT IS HEREBY ORDERED, adjudged, and decreed that the Motion be and it hereby is DENIED.

Entered this 11th day of January, 1984.

Walter E. Hoffman
United States District Judge
Sitting by designation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

ARTICLE I.

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, clause 5

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, clause 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, clause 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II

Section 1, clause 1

The executive Power shall be vested in a President of the United States of America ....

Section 2, clause 1

The President shall * * * have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 2, clause 2

... [H]e shall nominate, and by and with

the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law....

Section 3

...He shall take Care that the Laws be faithfully executed,....

Section 4

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1

The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admirality and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; -

between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 3, clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; ....

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indicitment of a Grand Jury, ...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ....

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the

subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If,

pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for use in the trial.

(d) If the United States elects not to

comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

ment made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Title 28

§ 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a

financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

Federal Rules Of Criminal Procedure

Rule 26.2. Production of Statements of Witnesses.

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his

objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the

attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury. (Added Apr. 30, 1979, eff. Dec. 1, 1980.)